

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
Lynchburg Division

3 UNITED STATES OF AMERICA Criminal 6:13cr00022

Criminal 6:13cr00022

Plaintiff,

LES CHRISTOPHER BURNS

Defendant. June 30, 2016

TRANSCRIPT OF EVIDENTIARY HEARING
BEFORE THE HONORABLE NORMAN K. MOON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Proceedings recorded by mechanical stenography; transcript produced by computer.

1 THE COURT: Good morning.

2 Call the case, please.

3 THE CLERK: This is the case of the United States of
4 America vs. Les Christopher Burns, Case #6:13cr22, defendant
5 number ten.

6 THE COURT: Government ready?

7 MR. MOUNTCASTLE: Yes, Your Honor.

8 MR. BEERS: Yes, Your Honor.

9 THE COURT: Mr. Beers, you may.

10 MR. BEERS: May it please the Court, Your Honor, Paul
11 Beers appointed to represent Mr. Burns.

12 I know the Court is familiar with the procedural
13 posture of this case. At the request of the government after
14 I raised some Brady and Giglio issues on appeal, the Fourth
15 Circuit granted the government's request for a remand for
16 evidentiary development. That's what we're here today for,
17 Judge.

18 I think my position is laid out as clearly as I could
19 lay it out in the briefs. I'd like to call some witnesses
20 today in support of our request, either for dismissal of the
21 indictment for prosecutorial misconduct or, in the
22 alternative, for a new trial.

23 THE COURT: Would you like to make a statement?

24 MR. MOUNTCASTLE: No, Your Honor. I believe our
25 position is laid out in our briefing papers.

1 THE COURT: Ready to call a witness?

2 MR. BEERS: Yes, Your Honor.

3 Defendants would like to call FBI Agent Bryan
4 Emmerson.

5 And I'd also like to make a motion to exclude
6 witnesses who aren't testifying.

7 THE COURT: If there are witnesses in the courtroom
8 that aren't testifying, I'll ask them to step outside.

9 MR. BEERS: Judge, I've talked to Mr. Mountcastle
10 about this.

11 THE COURT: Go ahead and swear the witness.

12 BRYAN EMMERSON, CALLED AS A WITNESS BY DEFENSE, SWORN

13 MR. BEERS: We have a number of exhibits we presented
14 attached to the briefs. To move this along, Judge, the
15 parties, if it please the Court, would like to move in en
16 masse their exhibits. There's no objection on either side to
17 the exhibits that are attached to the filings.

18 THE COURT: Okay.

19 MR. MOUNTCASTLE: That's right, Your Honor.

20 BY MR. BEERS:

21 Q. Would you tell the judge your full name, please?

22 A. My name is Bryan Emmerson.

23 Q. What do you do for a living, sir?

24 A. I'm a special agent with the FBI out of Roanoke
25 Virginia, Richmond division.

1 Q. Are you here because I subpoenaed you?

2 A. Yes, sir.

3 Q. Have you had a chance to talk to Mr. Mountcastle today
4 in anticipation and preparation for your testimony?

5 A. A few days ago, yes.

6 Q. And Ashley Neese, Ms. Neese?

7 A. Haven't spoken to her about this.

8 Q. Were you involved directly in this Pain Train
9 investigation Judge Moon is very familiar with?

10 A. No, sir.

11 Q. How did you get involved with Investigator Chris Cook
12 with the Bedford County Sheriff's Department? How were you
13 involved at all?

14 A. I came back from lunch at the wrong time. I came back
15 from lunch and my boss called me in the office and said, hey,
16 we've got something that's come up. I need you to go down to
17 the ATF and do an intake. There's been concern about some
18 public corruption. So I headed downstairs with my pad and
19 that's where it started for me.

20 Q. In Roanoke.

21 A. In Roanoke.

22 Q. Was the FBI asked by the U.S. Attorney's office to
23 participate in this interview of this woman we'll call EC?

24 A. I believe so. I was asked by my boss. That's what I
25 know.

1 Q. Was that on or about April 16, 2013?

2 A. Yes, it was.

3 Q. Did you -- so you attended an interview. Can you tell
4 us who was at the this interview at the ATF office?

5 A. An individual referred to as EC.

6 Q. A female; right?

7 A. Correct, and her attorney, Scott Weber; AUSA Neese;
8 Russell Davidson with the ATF, who I had not met before; and
9 an agent from my office went along with us because we
10 understood there might be a phone with some significant info
11 on it and he was electronically certified to download phones.
12 So he came as well.

13 Q. All right. This interview, you took notes during the
14 interview?

15 A. I did.

16 Q. Did you prepare a written report?

17 A. I prepared what we call an intake or 71.

18 Q. Okay. And you have that in front of you?

19 A. I do.

20 MR. BEERS: Would Your Honor like a copy? It's
21 already in evidence. I'll ask a number of questions about
22 it.

23 THE COURT: Is this --

24 MR. BEERS: It's the FBI's typed up --

25 THE COURT: I may have that.

1 MR. BEERS: It says "complaint" at the top.

2 THE COURT: Is this the same?

3 MR. BEERS: Yes, sir. Thank you, Judge.

4 BY MR. BEERS:

5 Q. Now, this is the typed up -- you took some handwritten
6 notes while you were there, I take it?

7 A. Correct.

8 Q. How long after this interview did you type up your notes
9 into this report?

10 A. I started it that afternoon. I actually went back to my
11 calendar when I got these questions prior to this hearing and
12 determined I finished it April 18, two days later, because I
13 had a different obligation the next day.

14 Q. Did you send a copy to people within the FBI?

15 A. I put it in my boss' in tray, yes.

16 Q. Did you send it to the U.S. Attorney's office?

17 A. No.

18 Q. Did anyone request it?

19 A. No.

20 To explain, this is an intake form so like if we had
21 somebody walk in off the street to make a complaint, we do an
22 intake where we put a basic summary of what they're saying.
23 It's kind of a triage mechanism for my boss to determine
24 whether we open a case, put it to a zero file. It's not
25 something typically that's disseminated.

1 Q. Ms. Neese was aware you were taking notes? She was
2 taking notes and you were taking notes; right?

3 A. She was, and I was across the table from her, yes.

4 Q. She was aware that typically, the FBI when they do
5 interviews, types up a report shortly thereafter. Is that
6 fair? Like a 302?

7 A. I don't know what her awareness is on intakes. I really
8 don't. I do know a couple years later, she asked if we had
9 done a report. I said, well, we did an intake.

10 Q. Now, turning to page two of your report, you say that
11 you learned that EC, this female, was a federal grand jury
12 witness on or about February 1, 2012?

13 A. Yes, sir.

14 Q. And that she started receiving some text messages from
15 Investigator Cook?

16 A. Correct.

17 Q. And moving us along, on December 8, 2012, did she meet
18 Investigator Cook at his request in the Montvale area?

19 A. Yes.

20 Q. Did she tell you that he was holding a six-pack of beer?

21 A. Yes, she did.

22 Q. She told you he was driving his Bedford County sheriff's
23 vehicle or another vehicle?

24 A. He was sitting in the van with a six-pack, and that made
25 her uncomfortable.

1 Q. This was a Bedford County Sheriff's Office vehicle that
2 he was driving around in; right?

3 A. Yes.

4 Q. And so, eventually, she allowed him to get into his car?

5 A. Her car.

6 Q. Her car.

7 He had already been dealing with her because she was a
8 grand jury witness; right?

9 A. Apparently they had spoken a couple times, yes.

10 Q. He's a vice agent, with the vice division of the
11 sheriff's office?

12 A. I honestly don't know. I know he was working with the
13 task force at the time.

14 Q. All right. And he made a sexual advance upon her? Is
15 that fair?

16 A. Yeah, I'd say that's fair.

17 Q. Did he ask her -- this is on the top of page three. Did
18 she ask him, aware that he had children?

19 A. Yes.

20 Q. Whether he was married?

21 A. Yes.

22 Q. And he said?

23 A. No.

24 Q. And you learned that was a false statement by
25 Investigator Cook subsequently?

1 A. I didn't learn it from him. I've heard it since, yeah.

2 Q. To your knowledge, he's married; right? He was married
3 at the time? You don't know?

4 A. Just rumor, yes. No one formally told me that.

5 Q. The bottom of page two, did he tell her, according to
6 EC, did he tell her that she had no exposure in this Pain
7 Train investigation, she was just a victim of circumstances?

8 A. In the December 8th meeting, yes.

9 Q. Yes.

10 A. Uh-huh.

11 Q. So he told her that she wasn't a likely target. She had
12 no exposure, just a witness; is that fair?

13 A. Correct, yes, in this first meeting.

14 Q. Then he tries to kiss her; is that right?

15 A. Yes.

16 Q. Did he -- did she also tell you -- she's in the driver's
17 seat of her car; right?

18 A. Correct.

19 Q. There's a console in the middle?

20 A. Uh-huh.

21 Q. Yes?

22 A. Yes.

23 Q. So he's in the passenger seat.

24 A. Correct.

25 Q. He's drinking.

1 A. Yes.

2 Q. Did she tell you that he grabbed her and tried to pull
3 her over the console into his lap?

4 A. Yes.

5 Q. Did she tell you she sustained a large bruise on her
6 thigh and knee because of that?

7 A. I remember the knee, yes. She sustained a bruise.

8 Q. Bruising?

9 A. Yes.

10 Q. Did she say that he asked her to sit on his erect penis?

11 A. I think she said he asked "did you feel that?"

12 Q. Referring to his privates; is that right?

13 A. Yes.

14 Q. Did she then get away from him and get back into her
15 driver's seat?

16 A. She did.

17 Q. She asked him some questions about -- you don't know,
18 but she asked him some questions.

19 A. She said they continued to talk.

20 Q. At one point -- what does she tell you next that she
21 noticed?

22 A. While she was continuing to talk, looking straight
23 ahead, she looked towards him and saw that he had unbuttoned
24 himself and pulled out his genitalia.

25 Q. All right. So your report, I think said he unzipped his

1 pants and he had unbuttoned his pants; right?

2 A. Let's see. That he had unbuttoned and unzipped his
3 pants, yes.

4 Q. And he was playing with himself, I think, your
5 expression?

6 A. Playing with his penis.

7 Q. So here's this officer masturbating in front of this
8 witness; right?

9 A. That's what she told us.

10 Q. That's what playing with his penis means; right?
11 Masturbating?

12 A. Yeah, semantics.

13 Q. Is it your impression the officer was asking her to
14 perform either oral or vaginal sex? Is that the impression
15 you got from her?

16 A. Yes.

17 Q. Did she comply?

18 A. No, not according to her statement.

19 Q. At any point -- at any point in this interview, and I've
20 read your report, did she tell you that she flirted with him
21 or he was just flirting with her? I don't see the word
22 flirtation or flirt in your report.

23 A. I don't recall her saying she flirted with him, no.

24 Q. The word flirtatious or flirt is nowhere in your report.

25 A. No.

1 Q. Then two days later, he asked her to meet her again?

2 Cook asked EC to meet him again?

3 A. I think I said a few days later, so I don't think she
4 was specific.

5 Q. All right. But it was in December.

6 A. Yes, a few days after December 8th.

7 Q. Did she tell you -- you can review the report, but did
8 she tell you she considered recording this second meeting?

9 A. She did.

10 Q. Did she actually record the second meeting?

11 A. No. She said she was afraid to do it. She was afraid
12 he'd notice.

13 Q. At the second meeting, there was no sexual contact;
14 correct?

15 A. Say that again? There was no sexual act?

16 Q. He didn't take his pants off during the second meeting.

17 A. No.

18 Q. Did he ask her for a kiss?

19 A. When she was departing the van, yes.

20 Q. And she just ignored that?

21 A. She pretended she didn't hear it.

22 Q. So there's no physical contact of any kind at the second
23 meeting; correct?

24 A. Correct.

25 Q. Now, we talked, Agent, a little earlier how at the

1 beginning he told her you're just a victim of circumstances,
2 you're not a likely target, you're just a witness. Did he
3 tell her that again at the second meeting two or three days
4 later?

5 A. No.

6 Q. What did he tell her?

7 A. He said she might be involved or that she was
8 involved -- yes; that she was involved, in quotes.

9 Q. And did he tell her there was a reasonable likelihood
10 now she was going to be arrested, words to that effect?

11 A. He did.

12 Q. Did he tell her he would be involved in this supposed
13 arrest?

14 A. He said he would come and arrest her and he'd be the one
15 to strip search her.

16 Q. Be the one to strip search her.

17 Now, that's false, right, just the strip search
18 statement? There's no way that the federal government, ATF
19 task force, is going to let a male go in someone's house and
20 strip search her, is it? No way.

21 A. It would not be protocol for that. You would check to
22 make sure there was no weapons or anything of that sort,
23 that's right.

24 Q. So he lied to her; is that fair?

25 A. Am I allowed to comment?

1 Q. Yes.

2 MR. MOUNTCASTLE: I'm going to object to that; asking
3 for speculation.

4 MR. BEERS: What's the speculation? He knows it's
5 preposterous. He's familiar with local law enforcement. The
6 federal government won't let a male strip search a female.

7 THE COURT: He was a Bedford County officer. I don't
8 know -- I mean, obviously, it's not going to happen. I mean,
9 it's not permissible.

10 MR. BEERS: That's obvious to us, Judge.

11 THE COURT: I mean --

12 MR. BEERS: Thank you, Judge.

13 BY MR. BEERS:

14 Q. Now, you looked into that comment? Not the strip
15 search. As the judge said, that's obviously not going to
16 happen. But did you then go to Ms. Neese and others in the
17 U.S. Attorney's office and say is she a likely target now?
18 Did you ask them that?

19 A. Did I ask at the end of the interview?

20 Q. Yes. Page five; right?

21 A. Correct. I asked was she a likely target because I was
22 interested in the initial comment from the December 8th
23 meeting of whether or not, you know, she was a victim of
24 circumstance or if she was truly a target at the beginning.
25 They told me that she was not, on either occasion.

1 Q. She was not a likely target then. She was not a likely
2 target at any point; correct?

3 A. Correct.

4 Q. So he, by telling her that, was trying to deceive and
5 mislead her. Is that fair?

6 A. It's what it sounds like. That's why I reported it as
7 she told us.

8 Q. Yes, sir.

9 Now, did you have any further involvement in the case?

10 A. No.

11 Q. Did Ms. Neese come to you -- you said a couple years
12 later. Did she ever come to you and say she needs your
13 report?

14 A. No.

15 Q. Did she ever come to you and say she needs your
16 handwritten report, the notes you took that day?

17 A. No, until a couple years later I got a call from her
18 asking if I had a report and if I had notes. I said yes, I
19 did.

20 This is, like I said before, an intake. It's a
21 complaint.

22 Q. Right.

23 A. Actually, a lot of times, you write your report and the
24 notes go away on an intake. On this one, I kept them because
25 it was an unusual scenario to be in, you know. So I kept them

1 and I had them and provided them to her at that point.

2 Q. When you say a couple years -- we've just been talking
3 about April 16, 2013. Do you mean 2014 or 2015 that she
4 requested it?

5 A. I think it was 2015 because I got another call in I
6 think it was August of 2015 when these proceedings were going
7 on and I did note that date and I know it was prior to that.
8 I don't have an exact date when it was, but it was well after
9 this. She had to remind me what she was talking about.

10 Q. I used the term 302 before.

11 A. This is not a 302.

12 Q. What's an FBI 302? That's the one I'm most familiar
13 with, having done criminal law.

14 A. So, this is an electronic communication in the form of
15 an FD71, which is an intake form. It's an internal document
16 that's intended to speak to the file, speak to the
17 supervisor, speak to within house. An FD302 is a formal
18 report you do when you conduct a formal interview in an open
19 investigation. This was not an investigation that was open.
20 This is what I would say is akin to triage. I'm the medic
21 walking up and down the line of the soldiers laying there
22 trying to determine what do we have here, what do I need to
23 tell the surgeon, my boss. I put it in a report. He looks
24 at it. He makes a determination whether, one, it's a
25 violation that we can work, we have the resources to work it,

1 we are going to work it; or two, if it needs to be put in a
2 file just to denote that it happened.

3 Q. All right.

4 A. So it's not a 302.

5 Q. But a 302 is an interview when the FBI is involved with
6 U.S. Attorney's office, the FBI interviews suspects,
7 witnesses cooperating parties?

8 A. In an open case, yes.

9 Q. That's a typical 302.

10 A. In an open case, this is the typical form in an intake.

11 Q. U.S. Attorneys are very familiar with those forms;
12 right?

13 A. Yes, those are the bricks you build a case with.

14 Q. They know that typically the FBI -- and in fact, there
15 are time limits. You need to type those up pretty quickly,
16 don't you, after you interview the witnesses.

17 A. Yes.

18 Q. So they know you have those and they have access to
19 those; right?

20 A. Correct, yes.

21 This is not a 302. I want to make that clear.

22 Q. Right. Let's put that down.

23 Since you were asked by the Attorney's office to get
24 involved, conduct this interview, did you get back to the
25 U.S. Attorney's office or talk to them about your findings?

1 MR. MOUNTCASTLE: I'll object. A couple issues here.

2 Number one, I don't believe he was asked by the U.S.
3 Attorney's office to do anything. He said he was asked by
4 his boss.

5 Number two, agent Emmerson is testifying pursuant to
6 a Touhy request, so the question about any further
7 discussions outside of this interview are beyond the scope of
8 the requested information in the Touhy request and the
9 information he's authorized to provide. So under law, he
10 cannot answer any questions that go beyond the scope of what
11 he had been authorized to provide based on the request made
12 by the FBI.

13 THE COURT: What's the question?

14 MR. BEERS: The question is did he get back to anyone
15 in the U.S. Attorney's office besides Ms. Neese about this
16 interview.

17 THE COURT: He can answer that.

18 THE WITNESS: I believe your question was, and
19 correct me if I'm wrong, did I --

20 BY MR. BEERS:

21 Q. That's my question. I rephrased it.

22 A. Did I get back to them because I was asked by the United
23 States office to be there? I was not asked by the United
24 States Attorney's office to be there. I was asked by my boss,
25 who I imagine had a conversation with the U.S. Attorney's

1 office. I went there. I took the report and I returned it
2 to my boss, which is protocol for a 71 intake.

3 Q. What's his name?

4 A. Jeffrey Taylor.

5 And I had no involvement after that. Just worker bee.

6 Q. You found -- as a law enforcement agent, you found this
7 Investigator Cook's conduct grossly inappropriate. Is that
8 fair?

9 MR. MOUNTCASTLE: I'm going to object.

10 THE COURT: Sustained.

11 MR. BEERS: No further questions, Your Honor.

12 MR. MOUNTCASTLE: I have no questions, Your Honor.

13 THE COURT: Thank you, sir. You may step down.

14 MR. BEERS: Can he leave, Judge?

15 THE COURT: It's fine with me.

16 THE WITNESS: Can I stay in the courtroom?

17 MR. BEERS: He's going to stay, Judge.

18 THE COURT: That's all right.

19 MR. BEERS: Defense calls Ashley Neese.

20 ASHLEY NEESE, CALLED AS A WITNESS BY DEFENSE, SWEORN

21 DIRECT EXAMINATION

22 BY MR. BEERS:

23 Q. Tell the judge your full name for the record, please.

24 A. Ashley Brook Neese.

25 Q. What do you do for a living?

1 A. I didn't hear you sir.

2 Q. What do you do for a living?

3 A. I'm an Assistant United States Attorney in the Western
4 District of Virginia, with the U.S. Attorney's office.

5 Q. How long have you been practicing law?

6 A. Practicing law; over eight years, about eight-and-a-half
7 to closer -- I think I was sworn in October of 2007.

8 Q. Investigator Cook that we've been talking about today
9 that is at issue in this case, what was his role in the
10 so-called Pain Train conspiracy investigation?

11 A. He was an investigator with the Bedford County Sheriff's
12 Office during the time period. She was just one of the
13 investigators.

14 Q. What was his involvement with Mr. Burns.

15 A. His involvement with Mr. Burns? He was one of the
16 investigators that was looking into the entire investigation
17 and into Mr. Burns.

18 Q. Wasn't he working with Mr. Burns when Mr. Burns was a
19 confidential informant?

20 A. Yes. I think beginning in October of 2012 after Mr.
21 Burns wanted to become a confidential informant, he had
22 signed up with the Bedford County Sheriff's Office and not
23 the Bedford Police Department.

24 Q. How long was Cook involved with the Pain Train
25 investigation?

1 A. I don't know prior to my involvement or the U.S.
2 Attorney's office involvement. I think I became involved
3 somewhere around August of 2012. There were approximately
4 five to six, either investigators or special agents on the
5 case or investigation, and he was one of those.

6 Q. So, did you and your office basically terminate his
7 involvement, tell the sheriff's department he was not to work
8 on the case anymore? Did there come a time that you did that?

9 A. August 16, 2013, I was directed, my supervision, to take
10 information to Captain Mike Miller of the Bedford County
11 Sheriff's Office and ask that he no longer be a part of the
12 Pain Train investigation, sir.

13 Q. You said August? Did you mean April?

14 A. I'm sorry, April of '13. April 16th of 2013. I'm
15 sorry.

16 Q. So as soon as you sat down with Agent Emmerson and
17 interviewed EC on April 15 and 16, the decision was
18 immediately made to fire him from the investigation, to
19 terminate him from the investigation.

20 A. I did not sit down with Agent Emmerson until April 16,
21 2013. I had sat down on April 15th of 2013 to conduct an
22 attorney proffer at the direction of my supervision, and
23 following that, I took the information to my supervision and
24 they made that call, yes, sir.

25 Q. Why? Why did you not want him on the investigation

1 anymore?

2 A. Well, I didn't choose that, but my supervision informed
3 me we were choosing that, basically. I didn't have a say in
4 it. I would have followed what my supervision said. It was
5 because of the alleged conduct at the time.

6 Q. So, this officer who had been working with you and
7 working on this investigation, because of what he did to EC,
8 was terminated, correct, from the investigation?

9 A. Based on her allegations, yes, sir; yes, sir.

10 Q. Do you have any doubt about the veracity of her
11 allegations?

12 A. No, sir.

13 Q. You keep saying her allegations, but he admitted them,
14 didn't he?

15 A. I was not part of that interview. That was an internal
16 interview, but based on what I received in May of 2013, yes,
17 sir -- excuse me, December of 2013, with the overview from
18 Elizabeth Wright, and then in May of 2014, it's my
19 understanding that he was truthful when he was interviewed
20 about the conduct.

21 Q. Right. So there's no doubt in your mind based on his
22 admissions and her statements that he pulled out his penis in
23 front of her in that car that night and started playing with
24 himself; right?

25 A. That's correct.

1 Q. Do you have your -- I've got a copy if you need it. Do
2 you have some notes, I think you made? Do you want a copy
3 there?

4 A. If you don't mind, sir.

5 (Document handed to the witness).

6 Thank you.

7 MR. BEERS: Judge, these are some handwritten notes.

8 Does the Court need a copy?

9 THE COURT: I don't have it before me.

10 BY MR. BEERS:

11 Q. Did you make these notes?

12 A. Yes, sir.

13 Q. At the top, are they covering one date or two dates?

14 A. They covered two dates, sir.

15 Q. So, let me ask. If I understand, Scott Webber is a
16 lawyer that was representing EC?

17 A. Yes, he contacted me on April 15th of 2013 to advise me
18 that.

19 Q. You first went and talked to Mr. Webber on April 15,
20 2013?

21 A. Yes, sir, at the direction of my supervision.

22 Q. Was -- when you went there to Mr. Webber's office, this
23 is in Roanoke?

24 A. Yes, sir.

25 Q. EC, his client, this female we've been talking about,

1 she was there, too.

2 A. She did come later.

3 Q. She was in the room at least for the part of the time.

4 A. Yes, sir.

5 Q. So these notes are from the April 15 meeting?

6 A. That's correct.

7 Q. Are some of these notes also from the next day when you
8 were at the ATF office when you interviewed her again with
9 Emmerson?

10 A. Yes, sir.

11 And just to clarify for the record, it was Mr. Webber
12 that was providing most of the information on April 15th.

13 Q. She was just there.

14 A. She was providing him with information that was being
15 relayed to me is how I was under the -- is what he was
16 informing me.

17 Q. But the three of you were there.

18 A. That is correct.

19 Q. Then the next day, you invited -- someone invited the
20 FBI and you met at the ATF office and interviewed her
21 directly; correct?

22 A. Yes. My supervision contacted the FBI.

23 Q. Do your notes state anywhere, ma'am, and I've read them
24 as carefully as I can, that EC said or admitted that she was
25 flirtatious with Investigator Cook? Is that word "flirt" or

1 "flirtatious" in these notes anywhere?

2 A. It is not, sir.

3 Q. Now, you took the interview and then what did you do
4 next? After this interview on April 16, 2013, what did you do
5 with this information?

6 A. I contacted my supervision, First Assistant United
7 States Attorney Tony Giorno, and Deputy Criminal Chief Thomas
8 Cullen, and asked them to talk with us about the information
9 and described it to them. Thomas Cullen came down to meet
10 with us. I provided him with my notes and he went to discuss
11 with management. I was advised later that ATF Special Agent
12 Russell Davidson and I, we were directed to take this
13 information, on that same date, April 16, 2013, to
14 supervision at the Bedford County Sheriff's Office.

15 Q. So now, did Agent Emmerson also, he was right there next
16 to you. He was taking his own notes; correct?

17 A. He was across the table from me in the room.

18 Q. Taking notes.

19 A. To the best of my understanding or to the best of my
20 recollection, I think so.

21 Q. You said in the affidavit that was allowed into evidence
22 that he was taking notes; right?

23 A. That's to the best of my recollection. Jesse Sebelius
24 was also there from the FBI and he was working on extracting
25 information from the cell phone.

1 Q. You understood or assumed, didn't you, because you've
2 been practicing, been a prosecutor for a number of years,
3 that the FBI would shortly thereafter type up Agent
4 Emmerson's notes into a typed report; right?

5 A. I actually do not know what they do on a case that is --
6 not a case, but whether or not it was going to be an
7 investigation, I did not know if he was going to type it up
8 or not. I knew he was going to talk to his supervision.

9 Q. Typically when you work with the FBI, they type up their
10 interview notes; right?

11 A. In cases with our office, yes, sir.

12 Q. Is Pain Train a case with your office?

13 A. Yes, sir.

14 Q. Okay. So now, did you go talk to the Bedford County
15 Sheriff's department, Investigator Cook's employer?

16 A. Special Agent Russell Davidson and I proceeded that day
17 to Captain Mike Miller's house, in Bedford County.

18 Q. The sheriff's department in Bedford County, they're part
19 of the ATF task force, involved in the Pain Train
20 investigation?

21 A. They had involvement. I'm not sure what you mean by
22 whether or not they were on the task force, I mean, actually
23 sworn in as task force officers. They were part of the case.

24 Q. They were part of the case.

25 A. Yes, sir.

1 Q. The task force, just for the record, is that cooperation
2 between federal and local authorities?

3 A. It can be, yes, sir. Essentially, typically places
4 place task force officers, law enforcement offices place task
5 force offices on ATF, FBI or DEA, whatever, but it doesn't
6 mean the whole office is actually in the task force.

7 Q. Getting away from task force or not task force, the
8 Bedford County Sheriff's department was intimately involved
9 in the Pain Train investigation.

10 A. They did have investigators involved in that, yes, sir.

11 Q. Including Investigator Cook.

12 A. He was one of them; right.

13 Q. You go over there to this captain's house; right?

14 A. Yes, sir.

15 Q. Did you tell the captain that his Investigator Cook
16 grabbed this woman, pulled her over the console of the car
17 and bruised her knee? Did you tell him all that?

18 A. Yes, sir. I provided my handwritten notes to him.

19 Q. Okay. You gave him the notes?

20 A. I gave him a copy of my notes, yes.

21 Q. My next series of questions are, did you tell him
22 Investigator Cook grabbed the woman and tried to pull her
23 over the console of the car and bruised her knee?

24 A. I actually don't recall the amount of detail we told
25 him. We told him an overview of what happened. I cannot

1 remember each and everything we told him. I'm sorry about
2 that.

3 Q. Here's one thing I want to ask you. Did he tell him his
4 investigator pulled out his penis and started playing with
5 himself in front of that woman? Did you tell him that?

6 A. Sir, I don't remember.

7 Q. You don't remember?

8 A. I remember I provided him with our notes, my handwritten
9 notes. I don't recall anything or every detail of what was
10 told to him, besides the fact that we gave him the notes. We
11 gave him the extraction report. We sat on his front porch and
12 we discussed the fact that we had a cooperating witness come
13 in and provide us with this information.

14 Q. Extraction report is just taking the text messages off
15 his phone; right? That's extraction report.

16 A. That's what the FBI calls it, yes.

17 Q. I'm not asking about that, okay? I'm asking when you
18 went over there to Captain Miller's house, did you tell him
19 anything about Investigator Cook exposing himself to this
20 poor woman?

21 A. I don't recall if I said that specifically. I do recall
22 telling him that there was misconduct.

23 Q. Right. Because you were protecting Investigator Cook
24 so, you never told him how bad it was?

25 A. Sir, I gave him my notes and it's stated in my notes.

1 Q. Where is it stated in the notes?

2 A. It's stated on the first page, over on the right side:
3 "He pulls it out and plays with himself. It's distinct,
4 penis, small." It's written.

5 Q. You handed it to him and said here you go; is that
6 right?

7 A. I did give it to him.

8 Q. Okay, all right.

9 Now, at that point, did you disclose any of this to any
10 of the defense counsel in this Pain Train conspiracy?

11 A. In April of 2013?

12 Q. Yes, ma'am.

13 A. No, sir.

14 Q. Were there internal discussions that maybe that was
15 going to need to be disclosed?

16 A. Sir, I had multiple discussions. I contacted every
17 criminal supervisor in the Roanoke office about this and two
18 Giglio officers, with the exception of the United States
19 Attorney.

20 Q. There are two Giglio officers in the Western District of
21 Virginia; is that true?

22 A. At that time point, yes, sir.

23 Q. Who are they?

24 A. At that time, the ones that -- were Jennifer Bockhorst
25 and Elizabeth Wright.

1 Q. And Jennifer Bockhorst was down in Abingdon. Works
2 across the street from the courthouse in Abingdon. She's
3 with the U.S. Attorney's office in Abingdon.

4 A. That's right.

5 Q. And Ms. Wright worked in the U.S. Attorney's office in
6 Harrisonburg.

7 A. That is correct.

8 Q. And they're both Giglio officers.

9 A. That is correct.

10 Q. So they're experts in Giglio procedures; right?

11 A. I don't know if I can classify them as experts, but it's
12 my understanding they receive specialized training in the
13 handling of Giglio matters. We do not, as line U.S.
14 Attorneys, receive that training.

15 Q. So you looked to them.

16 A. Yes, sir.

17 Q. Let me ask you about an email chain.

18 Judge, I'd like to give you a copy. It's in the
19 documents behind Ms. Neese's affidavit.

20 (Document handed to the Court).

21 Really, I'm just going to -- we don't have to go through
22 all of them. I'll ask you real briefly about the last two in
23 the chain.

24 A. Sir, this only says page three through six. I don't
25 know that I have the complete document.

1 Q. I'm just asking about these e-mails. I'll be specific.
2 An e-mail from you to Elizabeth Wright and Jennifer
3 Bockhorst, the Giglio officers, on December 6, 2013; right?
4 And Jennifer Bockhorst's response the same day?

5 A. Yes, sir.

6 Q. Now, at this time in November, December, were you
7 working with -- and prior to that in 2013, were you working
8 with Ms. Bockhorst as a Giglio officer?

9 A. Yes, sir.

10 Q. Had she given you any advice about whether you had to
11 disclose things or not up to this point, if you remember?

12 A. Sir, there's a March of 2013 e-mail where I had learned
13 of an issue in a Giglio questionnaire and I had raised it
14 with her and brought it to her attention. She advised me at
15 that point that Investigator Cook could still work on the
16 Pain Train matter and that she was going to reach out to get
17 documentation from the Botetourt County Sheriff's Office
18 because that's how our policies with the Department of
19 Justice and the United States Attorney's office was, that the
20 Giglio officer had to do those inquiries.

21 Q. Right. So let me back up and see if I understand this.
22 When you say there was another matter, I think you said
23 Investigator Cook. There's a whole 'nother set of issues
24 that was investigated by your officer concerning Investigator
25 Cook and that happened in Botetourt County; right?

1 A. It did.

2 I want to make sure I'm explaining this correctly. In
3 March of 2013, I completed a Giglio questionnaire.

4 Q. With Investigator Cook.

5 A. That is correct.

6 He had responded to one of the questions. The
7 information that was provided to me by Investigator Cook I
8 provided to my Giglio officer on or about the same day, and
9 that was a matter with the Botetourt County Sheriff's Office
10 prior to his employment -- it's my understanding, at least,
11 prior to his employment with the Bedford County Sheriff's
12 Office.

13 Q. So Ms. Bockhorst had had some involvement from March
14 forward advising you and she said she was going to write
15 Bedford County to get more information.

16 A. Botetourt County Sheriff's Office.

17 Q. Then in April, 16, you learn that he exposed himself,
18 Investigator Cook, to EC, and you terminated this guy, Cook,
19 from the investigation team.

20 A. The United States Attorney's office did, yes, sir.

21 Q. All right. So then, you're still talking though --
22 apparently it comes up again late in 2013. Were you getting
23 ready for trial in early '14 in one of the Pain Train cases?

24 A. Yes. There was a potential that a jury trial would go
25 between January 8th and January 10th, 2014. I think I had

1 brought it up with my supervisor, who had changed at that
2 point in time because Thomas Cullen had left. So I brought
3 it up with Deputy Criminal Chief Craig Jacobsen, who was my
4 direct supervisor.

5 Q. So back to our e-mail here, December 6, 2013. You lay
6 out these timeline of events and I want to ask you real
7 quickly. You talk about what happened on April 16, 2013, on
8 the interviews. Then you say that EC testified before the
9 grand jury, April 18th. Then you say "within a week, I
10 received word Investigator Cook had been demoted by Bedford
11 County, removed from vice."

12 Now, I want to ask you about Jennifer Bockhorst. She's
13 the Giglio officer; right? She says -- or you ask for a
14 conference call; is that right?

15 A. I think Elizabeth Wright asked for the conference call
16 previously. If you look back at the sixth page --

17 Q. Yes.

18 A. -- Elizabeth Wright asked Jennifer if she could be
19 available for a conference call.

20 Q. Now, Ms. Bockhorst says "forgive me for sounding grumpy,
21 but we don't need a conference call on this. If the guy has
22 been demoted, we need the documents from Bedford County and I
23 think that needs to be turned over if they say that's why
24 they demoted him. If they did it without a finding of
25 misconduct, then collect the documents and lay out the facts

1 in writing and submit an ex parte motion with the judge. I
2 don't see what else there is to talk about."

3 That's your Giglio officer talking to you; right?

4 A. That was one of them, yes, sir.

5 Q. You knew at that time he had been demoted and you knew
6 the facts and she said "what's so complicated, turn over the
7 documents to the defense counsel;" right?

8 A. That's what the e-mail says, yes, sir, and it goes on to
9 say lay out in ex parte.

10 Q. We're six months before we get to the ex parte motion
11 where you're about to talk to Judge Moon and your Giglio
12 officer told you to turn over the documents.

13 A. She was one of our Giglio officers. About this time, I
14 was assigned to work with Elizabeth Wright.

15 Q. Right.

16 Once you got that clear direction from Elizabeth
17 Bockhorst (sic), the Giglio officer, you changed Giglio
18 officers.

19 A. That is incorrect, sir. If you could read the e-mails,
20 I did not choose any of the Giglio officers. My supervision
21 did. Jennifer Bockhorst advised us she was too busy on a
22 case load and I was directed to work with Elizabeth Wright.

23 Q. So then you work with Elizabeth Wright and she's a
24 different Giglio officer and she gave you different advice?

25 A. Sir, I followed the advice and direction of all my

1 supervision and the Giglio officer in this case.

2 Q. Let's just move ahead to May. Now we're May 14th;
3 right?

4 A. Yes, sir.

5 Q. That's when you approach Judge Moon ex parte; right?

6 A. Yes, sir.

7 Q. So you've been sitting on this information since April
8 of 2013. You haven't told Mr. Snook, defense counsel; right?
9 You haven't told anybody.

10 A. I told a lot of people.

11 Q. You haven't told anybody outside the government, have
12 you?

13 A. Outside of the U.S. Attorney's office?

14 Q. You haven't told any defense counsel about this
15 misconduct by your Investigator Cook, former investigator.

16 A. That's correct. If you look at our e-mails in December
17 of 2013, I had asked my deputy criminal chief, Craig
18 Jacobsen, if I should release this information for anyone who
19 had pled guilty and both Jennifer Bockhorst and Elizabeth
20 Wright advised me that I didn't need to release that
21 information.

22 Q. You're letting people plead guilty not know about this
23 information; right?

24 A. I was advised I could do that. I inquired about it.

25 Q. Here we are in May of 2014 and you still don't want to

1 tell the guy's lawyer who's not pleading guilty, this guy's
2 lawyer, Mr. Burns' lawyer, you don't want to tell Mr. Snook,
3 here's the evidence. You don't want to do what Ms. Wright
4 said and just turn over the documents; right?

5 A. First off, Ms. Wright did not say that, sir. That's
6 incorrect. Second off, that's not correct. We did not
7 anticipate calling Christopher Cook to the stand. We thought
8 we could prove our case well besides that and if you read the
9 e-mails, it lays that out.

10 Q. Well, now at some point, you told the judge, Cook is
11 going to be a witness, he's going to read in a confession.

12 A. Yes. As my Declaration indicates, it's because Mr.
13 Snook filed a motion to suppress alleging Investigator Cook
14 and I had threatened Mr. Burns' then wife.

15 Q. You knew at some point, in April or May, you're going to
16 trial. Cook's just not going to take a plea -- Burns, not
17 Cook -- and Cook was going to be a witness at the trial
18 against Burns in June, right, '14?

19 A. On May 5, 2014, a motion to suppress was filed. I
20 contacted my direct supervisor on May 6, 2014, to discuss
21 whether or not Deputy Cook would be a witness at the
22 suppression hearing. At that point in time, we decided he
23 would be and that's when I was advised to follow the
24 direction of Elizabeth Wright, the Giglio officer working on
25 that matter.

1 Q. Where is Ms. Bockhorst? She's gone. She's out of the
2 case.

3 A. As the e-mails set forth in December, our supervision in
4 the U.S. Attorney's office in Roanoke, directed Ms. Wright to
5 be the Giglio officer over this matter, sir. I don't know
6 what they discussed. I just know that I was directed to work
7 with Elizabeth Wright.

8 Q. Why did you and Ms. Wright -- forget Ms. Bockhorst.
9 She's off the case. Why did you and Ms. Wright then just not
10 give the documents to Burns' lawyer?

11 A. I was advised and informed that I needed to make a
12 disclosure that was sufficient to provide a summary of the
13 nature of the conduct and that I also had to -- and that
14 would be sufficient to comply with my discovery obligations,
15 sir, and that I would also need to comply with the Department
16 of Justice's policy and procedures and also the United States
17 Attorney's office policy and procedures to take into
18 consideration the Privacy Act, sir. As I said, that's what I
19 was advised.

20 Q. So, you go in front of Judge Moon and you do this
21 without telling Snook; right? You never told Snook you were
22 going to talk to Judge Moon.

23 A. It was an ex parte proceeding.

24 Q. Secret.

25 A. Yes, sir. I think after the fact we had advised him we

1 did do that.

2 Q. Correct.

3 So, you then provided a summary to Judge Moon; is that
4 right? A summary of this agent's misconduct?

5 A. I had received draft examples and was advised on how to
6 work on drafting this, yes, sir.

7 Q. And your summary is in the record. We don't need to
8 belabor it, but you certainly didn't tell Judge Moon anything
9 about this Investigator Cook taking his penis out.

10 A. That detail was not included.

11 Q. Did you tell Judge Moon that the guy had lied about
12 being married?

13 A. No, sir.

14 May I explain?

15 Q. Let me ask you this -- yes, you can explain.

16 He told EC he wasn't married; right?

17 A. That is included in my notes, yes, sir.

18 Q. That was a lie.

19 A. Yes, sir, to the best of my knowledge of what I've been
20 informed, yes, sir.

21 Q. It's in the record already. The sheriff's department
22 said you're married.

23 A. That's correct.

24 Q. He lied to the woman and said "I'm not married."

25 A. That's correct.

1 Q. Did you tell Judge Moon about that lie?

2 A. That was not included, and if I could explain. As I
3 stated in my Declaration, I was getting advice from my
4 supervision and from my Giglio officers. That part of the
5 conduct was never described or highlighted and we considered
6 that part of the conduct, sir.

7 Q. Did you tell Judge Moon that the guy, Cook, on the
8 second occasion after telling her "you're not a witness,
9 you're a victim of circumstances, likely to be arrested," did
10 you tell Judge Moon on the second occasion, Cook went to this
11 lady and said you're likely to be arrested and I'm going to
12 be the one to strip search you if you are? Did you tell him
13 that? We just heard about all that from Agent Emmerson.

14 A. I think at least from my notes, he said you could be
15 arrested and that he would be the one to come potentially do
16 the thorough strip search and he advised her that she was
17 involved.

18 Q. Right. And none of that was true.

19 A. I think that's partially inaccurate. She was involved.
20 She had already been a grand jury witness and had been
21 notified. But the second part or the part about she could be
22 arrested at that point in time, sir, she was not a target of
23 our investigation.

24 Q. Didn't Emmerson come to you and say, wait a minute, why
25 is he flip-flopping within two days? Once he tells you

1 you're purely a witness -- we all know what that means.

2 Purely a witness. No exposure. Two or three days later, he

3 says, now you're involved, you're likely to be arrested.

4 A. Are you asking me if Emmerson asked us that?

5 Q. Yes. Didn't Emmerson come to you and ask you that?

6 A. To the best of my recollection, at the end of the

7 interview, Special Agent Emmerson asked me if she was likely

8 to be arrested or if she had been a target and I advised him

9 that she was not a target.

10 Q. And of course, this idea that a male, that you would

11 allow a male to go arrest a female subject and strip search

12 her, that's not true, is it? You would never allow that.

13 A. No, sir. Not that I have control over how they do their

14 arrests, but if it was my call, no, sir.

15 Q. It is your call. You're the prosecutor on the Pain Train

16 investigation.

17 A. Sir, I don't supervise individuals when they go out to

18 make arrests.

19 Q. Do you think a Bedford County sheriff would let him go

20 strip search a female in her house? What do you think?

21 A. I would hope not.

22 Q. So that's another false statement.

23 A. It was false, from my recollection, that she could be

24 arrested because she was not a target.

25 Q. So your understanding -- and you were there, you saw the

1 demeanor of this lady. This guy, Cook, he was just trying to
2 intimidate her? What was he trying to do? Sexual favors? What
3 was he trying to do?

4 A. Sir, I do not know.

5 Q. So, you didn't tell Judge Moon all these things. What
6 you did tell Judge Moon is that she admitted being
7 flirtatious and he admitted being flirtatious and they even
8 kissed. Right? That's what you told Judge Moon. Brief
9 summary; right?

10 A. That's part of the summary, yes, sir.

11 Q. A couple days later, the judge, His Honor, enters an ex
12 parte order; correct?

13 A. I'm pretty sure it's the same day.

14 Q. Because the trial is coming up.

15 A. We were worried about the suppression hearing and that
16 was on May 20th.

17 Q. Were you worried about defense counsel having all the
18 facts and the exculpatory information he needed to represent
19 this gentleman?

20 A. First of all, I was not advised this was any type of
21 exculpatory information at all. Second of all, I was advised
22 this was potential Giglio information and I was worried about
23 following the direction of my supervision and what Ms. Wright
24 was informing me in that we had to both file our discovery
25 obligations by providing a sufficient summary of the nature

1 of the conduct while also complying with the Department of
2 Justice's policy and procedures with the Privacy Act.

3 Sir, as I stated before, I did not have specialized
4 training in that nor do I know each and every detail of the
5 Privacy Act. So, I was being informed of this information
6 and trying to follow the direction that was given to me.

7 Q. Are you finished?

8 A. I'm sorry?

9 Q. Are you finished with your answer?

10 A. Yes, sir.

11 Q. I'll go on with the judge's order. Let's just go to the
12 last page. Page three. Do you have that?

13 A. Yes, sir.

14 Q. There's a copy. Have you reviewed this before your
15 testimony today?

16 A. I did. I have reviewed this.

17 Q. I can show it to you, let me just read you the key part.
18 It's at the end. Pretty short and straightforward, I think.
19 The judge says, you know, he says Cook's behavior while he's
20 involved with Botetourt County Sheriff's Office need not be
21 disclosed. That's the Botetourt County's, Investigator
22 Cook's conduct or misconduct over there, does not need to be
23 disclosed; right? Botetourt County?

24 A. That's correct.

25 Q. But Judge Moon said, Investigator Cook's December 2012

1 behavior while he was an employee of the Bedford County
2 Sheriff's Office and an investigator working on the Pain
3 Train investigation does need to be disclosed as soon as
4 possible to defendant pursuant to Giglio versus the United
5 States. Then in a footnote, the judge says "I note while I
6 determined this information must be disclosed to the
7 defendants so defendant may take part in argument about its
8 probative value and admissibility, I at this time take no
9 position on the question of whether Investigator Cook's
10 behavior will ultimately be deemed admissible."

11 So you understood this order, which is straightforward,
12 I think we can agree, and well written, to mean that you need
13 to provide evidence of this guy's behavior with respect to
14 EC, in December, 2012; right?

15 A. Of the behavior, yes, sir.

16 Q. Yeah. Did you provide any evidence of his behavior? I
17 think we can all agree it was misbehavior.

18 A. Yes, sir, I did provide a disclosure letter to Mr. Snook
19 at that time pursuant to what I was being advised by Ms.
20 Wright.

21 Q. I understand, and you've said enough times, I think --
22 if you want to keep saying it you can -- but I understand you
23 telling us Ms. Wright is advising you and right in there with
24 you the whole time; right?

25 A. Sir, I have to do that in compliance with my office

1 policy.

2 Q. But do you think -- do you think that that letter was
3 evidence? Your letter to him, was that evidence?

4 A. Sir, we noted it was part of the discovery in the case.
5 I'm not sure what you're asking.

6 Q. That letter is signed by you. You're not a witness;
7 right? That's not evidence from you. You're not a witness.
8 Snook can't call you to the stand. You just gave a summary.
9 You didn't give any primary evidence, did you?

10 A. Sir, I think he could if he wanted to try to conflict me
11 out of the case. Once I signed that letter, he could have
12 done that.

13 Q. What about the other evidence? What about Agent
14 Emmerson's typed FBI report specifying Cook's false
15 statements to this woman, specifying what he did to her? Did
16 you give that to Mr. Snook?

17 A. No, sir, and I need to explain why.

18 First, I did not have communication with the FBI about
19 that. My supervision did. I did not receive a copy --

20 THE COURT: Just a minute. Why, once I enter an
21 order, why did you have to go back to the FBI to see if you
22 can comply with my order? That's what I don't quite
23 understand.

24 THE WITNESS: Sir, I didn't go back to the FBI. I
25 went to Elizabeth Wright.

1 THE COURT: Well, Elizabeth Wright. Once I enter the
2 order, unless you appeal it, unless the order makes no sense,
3 I don't know why you would go to anybody but to supply the
4 information.

5 THE WITNESS: Sir, I understand that. What I was
6 trying to do was comply with my office's policy.

7 THE COURT: Your policy can't trump the Constitution
8 and it can't trump the rules of evidence and it can't trump
9 my order.

10 THE WITNESS: I understand that, sir. What I was
11 doing was complying with what my supervision had advised me
12 and what my Giglio officer had advised me, sir.

13 THE COURT: Okay.

14 BY MR. BEERS:

15 Q. So your testimony is that the United States Attorney's
16 office, including its Giglio office told you to disobey this
17 order.

18 A. No, sir, that's not my testimony. My testimony is that
19 I provided this order to Elizabeth Wright and then later to
20 Craig Jacobsen and I was instructed on how to follow this
21 order in a sense that I was given sample disclosure letter
22 language. I was also advised, because I had never had a
23 hearing like this or a matter regarding potential Giglio
24 information like this, I was advised to include the same
25 information because the summary of the nature of the conduct

1 was sufficient to comply with my discovery obligations and
2 also to comply with DOJ policy involving the Privacy Act. So
3 I submitted my disclosure letter that I drafted for Mr. Snook
4 to Ms. Wright. Once it was approved and there were no
5 substantive changes, just like the ex parte motion, I
6 submitted it because I thought I was doing the right thing.

7 Q. You did. You thought you were doing the right thing.

8 A. I did. In good faith, I truly thought I was doing the
9 right thing.

10 Q. Well, before you testified, did you y'all just didn't
11 think this was Giglio material so you just didn't discharge
12 your ethical obligations. You went in front of the judge and
13 said ask the judge and it's all in the record. You argued
14 hard this wasn't Giglio material, it didn't matter.

15 A. Sir, I said previously in my testimony it was potential
16 Giglio information and I was advised throughout my --

17 Q. You signed a pleading arguing that we shouldn't have to
18 turn it over, ma'am.

19 A. That's correct.

20 Q. Yeah, that's correct, okay.

21 So now then you have a hearing. You get to have a
22 hearing, extraordinary hearing, where this guy, who was
23 charged with very serious offenses, isn't even invited. His
24 lawyer is not there. You have a private chat with the judge.
25 He looks at the situation. He tells you to disclose the

1 behavior to defense counsel; correct?

2 A. He ordered that, yes.

3 Q. And did you give any evidence besides your summary,
4 which I don't think is evidence, but if you think it's
5 evidence, fine. Did you give any of the primary evidence
6 like the FBI report? No.

7 A. I didn't have it, sir.

8 Q. Did you give any of the Bedford County documents that
9 are in evidence to Mr. Snook?

10 A. We did not.

11 Q. Did you give these things to Ms. Wright, the woman you
12 say is telling you what to do?

13 A. Sir, Ms. Wright received the documents from Bedford
14 County. I did not. I was not in a position in the U.S.
15 Attorney's office to either request or receive potential
16 Giglio information as set forth in my Declaration.

17 Q. Do you or anyone else give Elizabeth Wright, the FBI
18 report typed up that we've just been talking about? Was that
19 given to Ms. Wright?

20 A. Sir, I do not know. You'll have to ask her. I did not
21 have that report until May of 2015 because I was not the one
22 communicating with the FBI.

23 Q. I'm not asking right now what Elizabeth Wright told you
24 to do or Mr. Giorno or anybody else. I'm asking you in your
25 mind as a prosecutor, do you think you gave any evidence to

1 Mr. Snook as you were ordered to do?

2 A. Sir, I was advised and had been advised multiple times
3 to comply with my discovery obligations I could also submit
4 e-mails giving an overview of testimony or giving an overview
5 of conduct. I submitted this disclosure letter and it was my
6 understanding that I was complying with my discovery
7 obligations and also with the Department of Justice's
8 policies and procedures.

9 Q. Let's depart from Judge Moon's ex parte order of May and
10 go back for a minute to his standing order in January.
11 There's a discovery order, right, joint discovery inspection
12 order. You sign these all the time, don't you?

13 A. Yes, sir.

14 Q. You don't check with Ms. Wright. She doesn't tell you
15 what to do. You sign them; correct? You endorse these. I'm
16 going to show it to you in a minute.

17 Is that right?

18 A. Yes, sir.

19 Q. You endorsed this order and you agreed that the United
20 States shall provide -- in fact it's further ordered that the
21 United States will provide to the defendant any evidence of
22 an exculpatory nature as defined in Brady v. Maryland and
23 those cases interpreting that opinion. You endorsed that,
24 Ashley Neese. You agreed to do that. You promised to do
25 that, didn't you?

1 A. Yes, sir.

2 Q. Do you want to see your signature? Is that your
3 signature? Seen and agreed; right?

4 A. Yes, sir.

5 Q. So before we even talk about the ex parte order, you're
6 already under a duty not to provide a summary, right, but to
7 provide the evidence that's exculpatory; correct?

8 A. Sir, the form in which we provide information I think is
9 not -- as long as the substance is there.

10 Q. Is that what that says to you? When you endorsed this
11 order, "provide any evidence of an exculpatory nature" you
12 think you can get away with just writing some summary?

13 A. First off, I was advised this was not exculpatory
14 information, that this was potential impeachment information.
15 Second, we've been trained we have to make the information
16 known as part of discovery.

17 MR. BEERS: Judge, just for the record, I was just
18 showing her Document 172, which is a joint inspection order,
19 dated January 22, 2014.

20 BY MR. BEERS:

21 Q. Didn't Judge Moon tell you, end any debate, when he went
22 back and considered your summary that you gave him? Didn't
23 he end any debate? He said this information needs to be
24 disclosed because it tends to impeach. He cited a Fourth
25 Circuit case to you, Sterling. He said this information about

1 his behavior concerning EC needs to be disclosed.

2 There's no more debate; right?

3 A. He did cite a Fourth Circuit case and that's correct.

4 Q. Right. So he told you exculpatory. He's told you
5 before when there's exculpatory information, you provide it.

6 A. He did not say exculpatory, sir.

7 Q. What did he say?

8 A. He said impeach, which is different than exculpatory.

9 Q. You think so?

10 A. Yes, sir.

11 Q. So you went to trial and just to sum up, Mr. Snook,
12 prior Court-appointed counsel, didn't know anything about
13 what happened that day during those occasions between EC and
14 Investigator Cook; right?

15 A. That's not correct.

16 Q. What did he know, based on your summary? Tell me what he
17 knew.

18 A. Exactly what my summary said.

19 Q. Right. What did it say?

20 A. I don't have the letter before me, but I think it's
21 essentially the same thing that I wrote in the ex parte
22 motion that I'd received.

23 Q. May 16, 2014, letter; right?

24 A. I'm actually reading from the motion because I don't
25 have the letter. If you have the letter --

1 Q. Let's look at the letter. You say you disagree with me
2 and you think you fairly informed his defense lawyer.

3 A. You asked me if I presented any evidence and yes, sir, I
4 did present some evidence.

5 Q. Some evidence. That's not what the order of January
6 told you and that's not what the order of May 14th, the ex
7 parte order, said when Judge Moon said give him the evidence
8 and you didn't do it. Is that right?

9 A. In the May 2014 order, he did say the behavior, yes,
10 sir.

11 Q. What you told Mr. Snook was that Ms. EC admitted -- let
12 me see if I can get this right. The witness, EC, admitted
13 that during encounters with Cook, she and Cook had been
14 flirtatious and even engaged in kissing. The witness said
15 Cook admitted to her he had consumed alcoholic beverages
16 prior to meeting with her on each indication and was driving
17 his undercover vehicle at the time he met with her on both
18 occasions.

19 Now, we've already gone over, I think with you and the
20 FBI agent, and nowhere in your notes or report is the word
21 flirtation or flirtatious even there; correct?

22 A. That is correct.

23 Q. Ma'am, you're not going to tell me when a guy grabs a
24 woman -- not a guy. An investigator grabs a female grand
25 jury witness, obviously trying to get some treatment from

1 her, that he grabs her, pulls her across the console of her
2 car, bruises her knee and then starts playing with himself in
3 front of her, that's not flirtation. Is that flirtation?
4 It's a very simple question. I don't want to hear about Ms.
5 Wright. I want to hear from you.

6 A. I think that's more than flirtation.

7 Q. That's right. Thank you.

8 And you didn't tell Mr. Snook that, did you?

9 A. I advised him of what was in the documentation, as we
10 advised him it was a summary of the nature of the conduct.

11 Q. And that was misleading. You misled Snook, didn't you?

12 A. I was not trying to mislead anyone.

13 Q. Really?

14 A. I was trying to comply with my discovery obligation,
15 sir, while also complying with the Department of Justice
16 policy.

17 Q. Let's get away from Investigator Cook's penis. Let's
18 talk about lying.

19 Did you tell Snook the guy lied to EC when she asked him
20 point blank "aren't you married" and he said "I'm single"?
21 Did you tell Snook that?

22 A. Again, we did not consider that separate conduct. At
23 the time, we were focused on the other conduct, the physical
24 conduct in trying to comply with that information. Plus, it
25 had never been brought up in my discussions with my

1 supervision or my discussions with my Giglio officers.

2 Q. Judge Moon, again, told you all behavior, all evidence,
3 and this is exculpatory, impeachment, needs to be disclosed
4 immediately; right?

5 A. He used the word behavior.

6 Q. And you didn't do that.

7 A. Not that specific statement.

8 Q. Let's go to one of the other misleading statements. One
9 of the many misleading statements, among many, is that all of
10 a sudden, she is likely going to be arrested now. She's no
11 longer just a witness. Likely to be arrested and if so,
12 he'll be the one to do it and he'll be sure to strip search
13 her at her house.

14 Did you tell Snook about that false statement?

15 A. She advised she was involved -- excuse me. She advised
16 he told her she was involved and could be arrested. At that
17 point in time, we determined that she was involved in the
18 investigation, so it was not separate from the conduct as
19 well. And no, sir, we did not turn that specific statement
20 over.

21 Q. Right. She was involved as a witness, but you told
22 Emmerson when he investigated, the agent, that she was never
23 going to be a target.

24 A. I said she was not a target.

25 Q. Right. Did you tell Snook that, that Cook tried to put

1 it in her head she would all of a sudden become a target?

2 A. Not that specific detail.

3 Q. That's fine.

4 Now, you did say in that sentence that he admitted to
5 consuming alcoholic beverages.

6 A. Yes, sir.

7 Q. Did you though say when you found out that you and Ms.
8 Wright and all the Army of people looking at this in your
9 office -- let me get this straight -- that he admitted he was
10 under the influence of alcohol when meeting with her and had
11 -- Cook admitted being under the influence of alcohol,
12 driving around in a sheriff's vehicle, and that he had
13 consumed approximately six beers prior to driving his county
14 vehicle to meet her? You didn't tell Snook that, did you?

15 A. I did not include the number. I did include he had
16 consumed alcoholic beverages prior to the meeting with her.

17 Q. According to --

18 A. And sir, if I could please finish.

19 I also advised Mr. Snook and the Court that he had
20 violated policy while consuming alcohol while operating his
21 police vehicle.

22 Q. But there's a difference, isn't there, between a cop --
23 you may or may not agree -- having a beer or two, but to
24 drive around in a vehicle, police vehicle, intoxicated,
25 intoxicated, is different than just telling someone that he

1 had had a beer; right?

2 A. I didn't say he had a beer, sir. I said he had consumed
3 alcohol and --

4 Q. But according --

5 A. Alcoholic beverages.

6 Q. And there was another deputy that I guess Investigator
7 Cook also drunk-dialed as a witness. Do you remember that?
8 There was another deputy that had to come and take Cook home
9 because he was so drunk?

10 A. I think she said she did not know if they met or not.

11 Q. In any event, according to the documents you had in your
12 possession that you decided not to give to Burns' lawyer, he
13 admitted to not only being under the influence and
14 intoxicated, he had six beers prior to going to see the lady;
15 correct?

16 A. I didn't state the number of the alcoholic beverage. I
17 thought I was conveying the information that he had been
18 drinking and driving.

19 Q. And also, when he got to EC and started coming on to
20 her, he was drinking more. We don't know how many beers he
21 had, but it was more than six; correct?

22 A. Sir, I do not know.

23 Q. But you didn't think that that was important for Snook
24 to know, not only was the guy drinking but he was
25 intoxicated. That wasn't important.

1 A. Sir, I'm sorry. I thought I did convey that with the
2 information in which I said he had consumed alcoholic
3 beverages and he had been drinking while driving his
4 undercover vehicle.

5 Q. And nowhere, ma'am, in this summary that you think was
6 okay, did you state to Mr. Snook, by the way, we have not
7 just a summary, we have actual evidence, we have documents,
8 we have an FBI report, we have Bedford County sheriff's
9 department investigation reports. We have evidence.

10 A. Sir, if I could please have a copy of the letter? If I
11 remember, it's similar in nature to what the ex parte motion
12 stated, that there was an interview that was conducted and
13 that there were text messaged that were attained.

14 Q. First of all, ma'am, that's not the question. The
15 question I'm on now -- we'll talk further about the ex part
16 motion in a minute, but the question now, just stick with the
17 letter to Snook, okay?

18 You didn't tell Snook, by the way, there are some
19 documents, evidence, that we have that you don't have. Did
20 you say that? Did you give him, for example, a privilege log
21 or a list of documents that you had concerning Investigator
22 Cook?

23 A. No, sir. What I stated was the witness was interviewed
24 about the alleged encounters and the witness provided law
25 enforcement with numerous text messages. So we thought it

1 was sufficient to inform him that we had additional
2 documentation.

3 Q. You told him you had text messages. Did you tell him you
4 had reports?

5 A. Sir, when -- the fact that she was interviewed, I
6 figured he would have known there would have been at least
7 documentation, whether it be handwritten notes or a
8 recording. It was not a recording in this case, but that's
9 typically how things are.

10 Q. Right. Just like you knew Agent Emmerson when he went
11 back to his office was going to type up his notes into a
12 report.

13 A. Sir, I didn't have communication with the FBI as to how
14 they were going to handle the matter.

15 Q. Uh-huh.

16 By the way, do you see anywhere in your ex parte motion
17 that you wanted to talk about -- and I'm about done, ma'am --
18 to Judge Moon, did you ever tell him about any of these
19 reports, that they were available?

20 A. I said -- I want to make sure I state all this, if
21 you'll give me some time.

22 Q. Sure.

23 A. My understanding was to provide a summary of the facts
24 surrounding the incidents in Botetourt County and Bedford
25 County. I was also informed how to do that and I received

1 different examples of how to do it. I also provided this
2 documentation where I stated that she had been interviewed
3 and there were numerous text messages. And then I also
4 stated in the eighth paragraph, as I thought I was supposed
5 to do based on my communications, that I would make myself
6 and the United States available and Cook available for
7 further questions and the United States will make further
8 documentation available to the Court, if requested.

9 It was my understanding that that was how I was supposed
10 to handle this. Again, sir, this was my first time handling
11 any potential Giglio matter like this.

12 Q. In your ex parte motion to the judge -- do you have that
13 in front of you?

14 A. Yes, sir.

15 Q. Can I see that for a second?

16 In footnote three on page seven, this is the ex parte
17 sealed motion for in camera review of potential Giglio
18 material. "The United States will provide the Court with all
19 the information received from the Botetourt County Sheriff's
20 Office and the Office of Campbell County Commonwealth
21 Attorney if it is requested."

22 Now, the reason Campbell County is involved is because
23 there was a special prosecutor from Campbell County that
24 tried to get an indictment against Cook in Botetourt County;
25 right?

1 A. That's what I was informed.

2 Q. But there's nothing in here about any documents you have
3 or that you could provide concerning Bedford County; correct?

4 A. That is not correct.

5 Q. You show us where it says Bedford County, ma'am, in your
6 motion to Judge Moon, and I'll be done.

7 A. Sir, under the Bedford County Sheriff's Office
8 information, we did not include paragraph eight as a
9 footnote. We included that as part of the information, to
10 ensure that we were trying to notify the Court that there was
11 further documentation available. I brought that
12 documentation to the hearing on that day. I conducted the
13 hearing the way that I thought I was supposed to based on my
14 communications and what I was advised and I had it available.
15 I was also informed that if it was requested that it could
16 not be made part of the record because there had been an
17 issue in another case in this jurisdiction whereby an ex
18 parte designation was removed and the documents had the
19 potential of being -- becoming unsealed. So, I was advised
20 that I was complying with my discovery obligations, but also
21 to comply with the Privacy Act or I would be in violation of
22 the Privacy Act, sir.

23 Q. No further questions.

24 A. I was trying to do everything correct and definitely in
25 good faith.

1 MR. BEERS: No further questions, Your Honor.

2 THE COURT: Let's take about a five-minute recess.

3 (Recess at 11:20 a.m. to 11:25 a.m.)

4 You may continue.

5 MR. MOUNTCASTLE: May I proceed, Your Honor?

6 THE COURT: Yes.

7 MR. MOUNTCASTLE: Thank you.

8 CROSS-EXAMINATION

9 BY MR. MOUNTCASTLE:

10 Q. Ms. Neese, I want to first clarify or ask you questions
11 about the Court's order that Mr. Beers asked you about. Do
12 you have that in front of you?

13 A. The order from May of 2014?

14 Q. Yes, ma'am, entered May 14th of 2014.

15 A. Yes, sir.

16 Q. Mr. Beers asked you some questions about the Court's
17 order that Investigator Cook's December 2012 behavior while
18 he was an employee of the Bedford County Sheriff's Office and
19 an investigator on the Pain Train investigation does need to
20 be disclosed. Do you recall those questions?

21 A. Yes, sir.

22 Q. What was your understanding of what information the
23 Court was directing you to provide?

24 A. My understanding was both based on all my communications
25 I had up to that point and based on my communications with

1 Ms. Wright following this order that I needed to provide the
2 same summary of the nature of the conduct that we had
3 provided to the Court.

4 Q. In May of 2014, May 14, 2014, after you received this
5 order, did you have the understanding that the Court was
6 directing you to provide any source documents or evidence, as
7 Mr. Beers refers to it, to defendants' counsel?

8 A. I did not. I thought I was supposed to provide the same
9 information that I had provided in the ex parte hearing, sir.
10 That was my understanding.

11 Q. If you had understood the Court to direct you to provide
12 the actual source documents, what would you have done?

13 A. I would have provided the source documents.

14 Q. Ms. Neese, when did you become an Assistant U.S.
15 Attorney?

16 A. In the middle of October of 2008.

17 Q. Before that, had you had any experience as a prosecutor?

18 A. No, sir.

19 Q. So in May of 2014 when you were dealing with this issue,
20 how long had you been an AUSA?

21 A. In May of 2014?

22 Q. Yes, ma'am.

23 A. Approximately five to five-and-a-half years.

24 Q. In terms of seniority in the U.S. Attorney's office at
25 that time, where did you rank?

1 A. I was a junior level line AUSA.

2 Q. Were there many AUSA's who had less seniority than you
3 at that time?

4 A. Sir, I was the youngest AUSA in the district and
5 probably one of the most least experienced. I can't say the
6 least experienced because people that were hired after me had
7 been in practice longer than me.

8 Q. Prior to May 2014, what experience did you have in
9 dealing with Giglio issues?

10 A. Virtually none. I had completed Giglio questionnaires,
11 but nothing to the matter of this issue.

12 Q. Prior to May of 2014, what was your experience handling
13 Giglio issues involving law enforcement officer witnesses?

14 A. This was the first matter that had anything to do with
15 potential Giglio information that I was involved with
16 directly.

17 Q. In May of 2014, what was your understanding about the
18 manner in which you were required to handle potential Giglio
19 information about a potential law enforcement witness?

20 A. My understanding -- and I want to make sure I'm
21 understanding your question correctly. My understanding was
22 that I needed to discuss with my Giglio officer and my
23 supervision on how to handle matters. I was a line AUSA. I
24 was not entitled to the underlying potential Giglio
25 information that would have been received from law

1 enforcement agencies if requested from our officers for
2 supervision in our office until or unless a determination was
3 made that we needed to have an ex parte motion to file and a
4 potential in camera hearing that was supposed to be ex parte.
5 That would allow me to comply with, my understanding, with
6 both my obligations under the discovery obligations and also
7 my U.S. Attorney office policy and the Department of Justice
8 policy, sir.

9 Q. What was your understanding about your authority
10 individually as an Assistant U.S. Attorney regarding the
11 manner in which potential Giglio information about a law
12 enforcement officer was handled?

13 A. My understanding was that I would be directed by my
14 supervision and/or Giglio officers on how to handle these
15 matters. As I stated, I was not entitled to that information
16 until a later time, and I still had to work directly with
17 supervision and/or my Giglio officers, depending on how they
18 directed me.

19 MR. MOUNTCASTLE: Your Honor, for the record, I've
20 provided the clerk with the government's exhibits which have
21 been marked as 1 through 39. Those are the exhibits that
22 were attached to the government's response to the motion, the
23 defendant's motion, and I'm asking that those be entered as
24 part of the record for this hearing.

25 THE COURT: Okay.

1 MR. BEERS: No objection. I thought both sides'
2 exhibits had already been entered.

3 MR. MOUNTCASTLE: I just provided mine in a separate
4 format. I just wanted to make sure.

5 MR. BEERS: No objection.

6 MR. MOUNTCASTLE: Thank you.

7 (Government Exhibits #1-39, previously submitted,
8 were admitted into evidence).

9 BY MR. MOUNTCASTLE:

10 Q. Ms. Neese, do you have a copy of your Declaration?

11 A. Yes, sir, I do.

12 Q. With respect to paragraph four, how did you first learn
13 of any potential Giglio information pertaining to Officer
14 Cook?

15 A. In my employment position, I followed United States
16 Attorney's office policy in March of 2011 and completed the
17 Giglio questionnaire with Deputy Cook of the Bedford County
18 Sheriff's Office.

19 Q. You said March of 2011. Did you mean March of 2013?

20 A. March 11, 2013, on or about. Excuse me.

21 Q. So you uncovered that potential, initially the first
22 potential Giglio information pertaining to Officer Cook; is
23 that correct?

24 A. Yes, sir, and I almost immediately notified our Giglio
25 officer.

1 Q. Why did you contact Ms. Bockhorst and Mr. Cullen about
2 that information?

3 A. I contacted them because Ms. Bockhorst is one of the
4 Giglio officers and it's policy and procedure to do that and
5 Thomas Cullen was my direct supervisor who supervises my
6 cases and I am supposed to notify him of anything that came
7 up and this was an issue that had come up.

8 Q. During the March 2013 discussion with Officer Cook, did
9 he disclose anything to you about his December 2012
10 encounters with the witness that you were questioned about by
11 Mr. Beers?

12 A. No, sir.

13 Q. With respect to paragraph eight of your Declaration, how
14 did you first become aware of Officer Cook's potential Giglio
15 information regarding his sexual misconducts with the Pain
16 Train investigation witness?

17 A. On or about April 15th of 2013, Attorney Scott Webber
18 contacted me and advised me that he was representing a
19 witness in the overall Pain Train investigation and he
20 provided me with an overview of information regarding Cook's
21 contact with this witness.

22 Q. With regard to paragraph nine of your Declaration, why
23 did you advise Mr. Cullen about that information?

24 A. I advised him almost immediately after I received this
25 information because he was my direct supervisor at the time

1 at the United States Attorney's office. Again, as per
2 policy, I need to keep my supervision informed of anything
3 that comes up in a case.

4 Q. With respect to paragraph ten of your Declaration, you
5 make reference to a First Assistant United States Attorney,
6 Tony Giorno. What was your purpose in including him on an
7 e-mail regarding the scheduling of the proffer and interview
8 of the grand jury witness?

9 A. It was my understanding once I advised Thomas Cullen of
10 this matter, he also advised the First Assistant United
11 States Attorney to keep upper level management apprised as to
12 what was going on. After the meeting, I contacted both Thomas
13 Cullen and First Assistant United States Attorney Tony Giorno
14 at the time to make sure I was complying with the obligations
15 I have as an Assistant United States Attorney to inform
16 management in my office.

17 Q. Can you explain the level of supervision that a First
18 Assistant United States Attorney has in a U.S. Attorney's
19 office?

20 A. He basically is the overseer for the United States
21 Attorney's office for the Western District of Virginia,
22 besides the United States Attorney. So he oversees both the
23 civil and criminal divisions.

24 Q. Is he second in command to the U.S. Attorney?

25 A. Yes, sir, he is.

1 Q. Is that two or three levels of supervision above you?

2 A. At least two, if not three.

3 Q. What was your role in arranging for the grand jury

4 witness that we've talked about in this proceeding?

5 A. I was advised -- well, it was my understanding to go
6 ahead and schedule an interview, but I had scheduled it with
7 ATF Special Agent Russell Davidson and myself. Management in
8 my office notified the FBI and had them get involved in the
9 interview the next day, on April 16, 2013.

10 Q. So did you have any role other than being present and
11 having discussions with Agent Emmerson? In conjunction with
12 that interview on April 16th, did you have any other role
13 with the FBI's involvement in this matter?

14 A. No, sir, I did not.

15 Q. Was the FBI part of the Pain Train investigation?

16 A. No, sir, they were not.

17 Q. And following that interview, why did you e-mail both
18 Mr. Cullen and Mr. Giorno to schedule a discussion about the
19 results?

20 A. It was my understanding that I needed to inform them of
21 what was said and provide them with the documentation, both
22 my notes and the extraction report that I had received
23 because they were the ones making determinations in our
24 office.

25 Q. Now, when you -- you were asked questions by Mr. Beers

1 regarding your conversation with Bedford County Sheriff's
2 Office's Captain Miller, on April 16th of 2013. Do you
3 recall those questions?

4 A. Yes, sir.

5 Q. And do you know why Mr. Cullen directed you to provide
6 Captain Miller with the information about this potential
7 Giglio information about Officer Cook, the misconduct he had
8 with the witness, to include your notes?

9 A. Sir, we did not have a copy of Agent Emmerson's notes or
10 an FBI report on that day. We had my notes, which covered
11 essentially everything that was said. I was advised that I
12 needed to take this, with Special Agent Davidson, to Captain
13 Miller to make Bedford County Sheriff's Office fully apprised
14 as to what the witness had informed us and the information
15 that we had gotten from the extraction report, which was
16 based from her phone.

17 Q. And did you understand your notes to have the essential
18 details of Officer Cook's misconduct with the witness?

19 A. Yes, sir.

20 Q. And were your notes -- aren't they attorney work
21 product?

22 A. They are, yes, sir.

23 Q. But you still provided those to Captain Miller; is that
24 right?

25 A. Yes, sir.

1 Q. In paragraph 14 of your Declaration, can you tell us why
2 you advised Captain Miller to contact Mr. Cullen if he had
3 any questions about the information that you provided to him
4 regarding Officer Cook's misconduct with the witness?

5 A. Because I'm a line AUSA and I do not have any
6 decision-making authority in the United States Attorney's
7 office. Deputy Chief Thomas Cullen did and he advised me I
8 needed to notify the Bedford County Sheriff's Office and
9 Captain Miller, that he was the contact for any further
10 information about Deputy Cook.

11 Q. With regard to paragraph 15 of your Declaration, which
12 is Exhibit 1 in this proceeding, why did you schedule a
13 discussion with your new supervisor, Mr. Jacobsen, regarding
14 the potential Giglio information about Officer Cook?

15 A. I recognized the need that we needed to make a potential
16 or have a potential discussion about the potential Giglio
17 matters and I recognized that I needed to figure out how to
18 handle the matter and I had to go through supervision and a
19 Giglio officer for that, sir.

20 Q. So was it your intent to seek supervisory guidance to
21 ensure you handled it correctly?

22 A. Yes, sir, that was my intent.

23 Q. With respect to paragraph 17 of your Declaration,
24 Exhibit 1 in this proceeding, what was your understanding
25 about the roles of Ms. Wright and Ms. Bockhorst in the

1 handling of the potential Giglio information pertaining to
2 Officer Cook?

3 A. My understanding is that they were both Giglio officers
4 in our office and at that point in time, I do not know if Mr.
5 Jacobsen had advised me to go through Ms. Wright or if it was
6 both Ms. Wright and Ms. Bockhorst. But they were the ones to
7 reach out to Botetourt County and Bedford County to obtain
8 any potential personnel file information. They would obtain
9 that information as they're required to do under the
10 Department of Justice's policy and also the U.S. Attorney's
11 policy. Since I'm a line AUSA, I'm not entitled to that
12 information until or unless I'm notified I can receive a
13 copy.

14 Q. Ms. Neese, do you still have a copy of the e-mail from
15 December of 2013 that Mr. Beers was asking you about, the
16 e-mail from Ms. Bockhorst where she talks about sounding
17 grumpy?

18 A. It says page three of six, so I don't have the complete
19 e-mail chain, but yes, sir, I do have that one.

20 Q. I'm going to show you a copy of it. It's in evidence
21 now as Exhibit 9 for purposes of this proceeding.

22 Would you please turn to the December 6, 2013, e-mail
23 from Ms. Bockhorst to yourself, Ms. Wright, and a copy to Mr.
24 Jacobsen where she starts off "forgive me for sounding
25 grumpy."

1 Do you have that?

2 A. Yes, sir, I do.

3 Q. In this e-mail, you were asked a number of questions and
4 I want to make sure it's clear here.

5 When you look at this e-mail, did Ms. Bockhorst say that
6 whatever that information was, referring to Officer Cook's
7 Bedford County potential Giglio information, that that needed
8 to be turned over right then?

9 A. No, sir, it does not.

10 Q. Does she, in fact, say that it depends on what the
11 information is from Bedford County and what their findings
12 are?

13 A. Yes, sir.

14 Q. To your knowledge, as of December 6, 2013, had you or
15 anyone else in the U.S. Attorney's office received any of the
16 information in Bedford County regarding Officer Cook's
17 misconduct with the witness?

18 A. I had not received the information, any documentation,
19 and it was my understanding from the e-mails I received that
20 no one else had as well.

21 Q. Based on your understanding of the policies provided by
22 the U.S. Attorney's office and Department of Justice, would
23 you have been allowed to ask for or receive that information
24 from Bedford County?

25 A. I would not have been allowed to receive that

1 information.

2 Q. Under the department's policy and guidelines and U.S.
3 Attorney's policies and procedures, who could request and
4 receive that information from Bedford County?

5 A. I know the Giglio officers in our office can do that. I
6 don't know this for sure, but supervision is also allowed to
7 look at that information. I don't know if they're allowed to
8 receive it. This e-mail says either Jake or Elizabeth could
9 reach out to the sheriff to get things started.

10 Q. As of December 6, 2013, based on Ms. Bockhorst's e-mail
11 to you, does it indicate that no one had yet reached out to
12 those agents, to the Bedford County Sheriff's Office?

13 A. Botetourt or Bedford. No one had reached out to them,
14 it was my understanding, sir.

15 Q. Referring you to your Declaration at paragraph 17. So,
16 what did you understand the roles of either Ms. Wright or Ms.
17 Bockhorst in terms of handling the potential Giglio
18 information pertaining to Officer Cook?

19 A. My understanding was that either Elizabeth Wright or
20 Jennifer Bockhorst as Giglio officers, they would request the
21 information from both Botetourt County and Bedford County.
22 They would receive that information and retain that
23 information in a private manner, in compliance with the
24 Privacy Act because of the information containing personnel
25 file information.

1 Q. In the e-mail Exhibit 9, Ms. Bockhorst talks about
2 collect the documents, lay out the facts in writing and
3 submit an ex parte motion to the judge. Do you recall seeing
4 that?

5 A. That is in the e-mail, yes, sir.

6 Q. Based on your understanding of the policy and guidance
7 in effect at that time, who had the authority to decide
8 whether to turn that information over or whether you first
9 had to go to the Court with some sort of ex parte motion and
10 go through his other procedure?

11 A. I had received information that my supervision and the
12 Giglio officers would make that determination. There were
13 multiple e-mails that informed me that at some point in time
14 I may have to file an ex parte motion, but I was just
15 following what my supervision or what my understanding from
16 my supervision and Giglio officers was, sir.

17 Q. At paragraphs 19 and 21 of your Declaration, do you see
18 where you discuss or talk about having discussions or
19 arranging for discussions about the potential Giglio
20 information pertaining to Officer Cook with the First
21 Assistant U.S. Attorney?

22 A. Paragraph 19, yes, sir.

23 Q. What was the reason that you wanted to schedule a
24 discussion with a first assistant U.S. Attorney regarding
25 Officer Cook's potential Giglio information?

1 A. Sir, we had originally had Tony Giorno involved back in
2 April of 2013 and I wanted to ensure I was keeping all my
3 supervision apprised of what was going on to ensure I was
4 both complying with the discovery obligations that I had and
5 also with the Privacy Act, sir.

6 Q. With respect to paragraph 22 of your Declaration, what
7 was your understanding about the reason that Ms. Wright told
8 you the potential Giglio information received from Botetourt
9 County, "should be treated entirely conflictually for now"?

10 A. As a line AUSA, I'm not actually allowed to know all of
11 that information until or unless there's a potential it could
12 be turned over in an ex parte motion and she advised me to
13 treat it confidentially to ensure I was complying with the
14 Department of Justice policies and procedures.

15 Q. And the Department of Justice policies and procedures
16 with respect to what?

17 A. The Privacy Act, sir.

18 Q. With respect to paragraph 24 of your Declaration, what
19 was your understanding about the reason that Ms. Wright
20 summarized information received from the sheriff's office
21 pertaining to truthfulness and bias?

22 A. She summarized that information to just give me an
23 overview of the information and she informed me that it did
24 not pertain to truthfulness or bias as the Bedford County
25 attorney and the county sheriff's office had made that

1 determination. Additionally, she advised me that Deputy Cook
2 had been truthful in his responses in whatever interview had
3 been conducted by the Bedford County Sheriff's Office.

4 Q. At that time, what was your understanding about the
5 admissibility of the potential Giglio information received
6 from the Bedford County Sheriff's Office?

7 A. Based on the summary e-mail from December 24, 2013, and
8 then following, as listed in paragraph 25 of my Declaration,
9 the statement by Anthony Giorno on December 30, 2013, that
10 there was no evidence to support a claim that Cook was
11 untruthful or dishonest, it was my understanding based on the
12 guidance that I had been provided that this was likely not to
13 be admissible for cross-examination purposes.

14 Q. And did that information have any impact or effect on
15 your view of the extent to which you were required to
16 consider Officer Cook's privacy interests in those matters?

17 A. Yes, sir. We had previously informed me, as I stated on
18 direct, that there had been an issue in another matter I was
19 not involved in and I relied on the information I received in
20 the e-mail in my communications that there had been an ex
21 parte designation removed and the potential for documentation
22 to be unsealed and thus it could have been a violation of the
23 Privacy Act, which would have been a violation for the AUSA
24 in the case and the United States Attorney's office in
25 general. We were trying not to violate either the discovery

1 obligations we had or the Privacy Act, sir.

2 Q. Explain why there was this concern about privacy
3 interests of the officer in the context of potential Giglio
4 information.

5 A. It was my understanding that was what was provided to
6 me, that that was our obligation, as well. As Assistant
7 United States Attorneys, that we have to comply with the
8 Privacy Act if the information received was personnel file
9 information.

10 Q. What was your understanding -- did you have any
11 understanding about whether there might be any consequences
12 should yourself or another employee of the U.S. Attorney's
13 office not consider the privacy interests of Officer Cook in
14 his personnel file information?

15 A. Yes. My understanding was, based on all my
16 communications with everyone, was essentially that I could
17 get in trouble for a violation under DOJ policy and
18 procedures and that I could also potentially be open and
19 subject to being sued.

20 Q. In May of 2014, had you begun preparing for the trial of
21 the defendant in this case, Mr. Burns?

22 A. I had two trials back-to-back. I had United States vs.
23 Sheek Trice, May 27th through May 29th, in Roanoke, before
24 Judge Conrad, and then United States vs. Les Christopher
25 Burns June 2nd through June 6th, with Judge Moon, here in

1 Lynchburg. So we were trying to prepare for trial
2 preparation, but it was starting to ramp up with both cases.

3 Q. At paragraph 29 of your Declaration, you mention Ms.
4 Wright's suggestion that you should take a position with
5 regard to the potential Giglio information pertaining to
6 Officer Cook?

7 A. Yes, sir.

8 Q. What was the position that she suggested you should
9 take?

10 A. She suggested that I take the position that even if the
11 Court decided the information should be disclosed, it should
12 not be allowed for the use of cross-examination and I could
13 argue why a disclosure of the information was not necessary,
14 based on that information. That's what I was advised, sir.

15 Q. During this time frame, did you continue to have
16 discussions about this potential Giglio information with your
17 supervisor?

18 A. Yes, sir. I spoke with him on both May 6, 2014, and
19 May 7, 2014, and then again, as indicated in the ex parte
20 hearing transcript, I spoke with him the night before the ex
21 parte hearing.

22 Q. What advice, if any, did he give you on how you should
23 handle the potential Giglio information pertaining to Officer
24 Cook?

25 A. He advised me that I needed to comply with our Giglio

1 officer, Elizabeth Wright's suggestions and guidance in this
2 case.

3 Q. Did you have an understanding in the preparation of the
4 ex parte motion, and I think I'm referring to your
5 Declaration, Exhibit 1, at paragraph 34, did you have an
6 understanding of what you could or should include in the
7 summary of the conduct in question? And we're talking about
8 the Bedford County Giglio, potential Giglio information.

9 A. Sir, it was my understanding if there was the potential
10 of it not being admissible that I would need to provide a
11 summary of the nature of the conduct based on my
12 communications with supervision, the e-mails and also with my
13 communications with the Giglio officer.

14 Q. So what was the basis for your understanding that you
15 should, was preferable, to provide a summary of the conduct
16 to the Court?

17 A. To ensure that I didn't release Privacy Act or potential
18 Privacy Act information. I didn't want an unwarranted
19 disclosure of that information, but I also wanted to ensure
20 that I was complying with my discovery obligation, sir.

21 Q. Where did you get that understanding from?

22 A. My supervision and Giglio officer.

23 THE COURT: What came first, the privacy of Cook or
24 the constitutional obligation to the defendant?

25 THE WITNESS: Sir, it was my understanding I was

1 complying with my discovery obligations by providing this
2 summary information.

3 THE COURT: Was there any discussion about the fact
4 that he may have told her that she would be arrested and he
5 would come and do a strip search at her home?

6 THE WITNESS: With my supervision and with my Giglio
7 officer, that was not discussed, sir.

8 THE COURT: To me, that's the dead horse in the
9 living room. That's the biggest thing about this case. I
10 don't know why that didn't jump out as being something really
11 bad.

12 THE WITNESS: I'm not sure. Again, this was my first
13 time handling this matter and I was relying upon them and we
14 did not discuss that statement. It was included in my notes,
15 sir.

16 THE COURT: It was what?

17 THE WITNESS: It was included in my notes that we
18 provided to Bedford County Sheriff's Office and it was
19 included in the information that Ms. Wright received from the
20 Bedford County Sheriff's Office.

21 THE COURT: But it wasn't told to me at the hearing,
22 ex parte hearing, and it wasn't told to Mr. Snook.

23 THE WITNESS: That is correct, sir.

24 Again, as I stated in my Declaration, we thought that
25 was part of the conduct overall and it was not highlighted in

1 my communications.

2 BY MR. MOUNTCASTLE:

3 Q. Did you just plain forget about it?

4 MR. BEERS: Objection to leading. He's been leading
5 and leading and leading, but now he's really leading.

6 THE COURT: Sustained.

7 MR. MOUNTCASTLE: Thank you, Your Honor.

8 BY MR. MOUNTCASTLE:

9 Q. So at paragraph 37 where it discusses the summary
10 contained in the ex parte submission to the Court -- do you
11 have that in front of you with regard to your Declaration?

12 A. Yes, sir.

13 Q. I've got two more exhibits that I need to offer to the
14 Court.

15 Ms. Neese, I'm going to hand you what has been marked
16 for identification as Government's Exhibit 30A. Would you
17 tell the Court what that document is?

18 A. This is a track-changing document that I received back
19 from my Giglio officer, Elizabeth Wright, on May 12, 2014.

20 MR. MOUNTCASTLE: I'd move for the admission of
21 Government Exhibit 30A. The document submitted as Exhibit 30
22 was printed as a final and doesn't have the track changes.
23 For completeness of record, I ask the Court to admit this
24 document.

25 MR. BEERS: No objection, Judge. I just don't know

1 why it matters. They're drafts. But no objection, Judge.

2 All right.

3 MR. MOUNTCASTLE: If we want to argue that, I can.

4 I'll leave it to the Court.

5 (Government Exhibit #30A was marked for
6 identification and admitted into evidence).

7 BY MR. MOUNTCASTLE:

8 Q. So, you provided, you drafted an ex parte motion to
9 submit to the Court; correct?

10 A. Yes, sir, I did.

11 Q. Why did you do that?

12 A. Based on my communications, it was my understanding that
13 I needed to provide the Court with a summary of this
14 information in order for the Court to make a determination if
15 we needed to disclose the summary.

16 Q. Did you have anybody else in the office review it?

17 A. Drew Bradylyons and Elizabeth Wright.

18 Q. Did you receive any response from Ms. Wright after she
19 reviewed your motion?

20 A. Yes, she sent back a revision.

21 Q. Is that 30A that's just been submitted into evidence?

22 A. Yes, sir.

23 Q. Did Ms. Wright propose any changes to the substance of
24 the summary of Officer Cook's misconduct with the witness?

25 A. Not to the substance, just a few minor changes.

1 Q. What effect, if any, did that have on your understanding
2 about the sufficiency of the submission of the ex parte
3 motion?

4 A. It was my understanding at that point in time after
5 making her proposed edit that it was sufficient to comply
6 with my obligations, sir, and sufficient also to follow the
7 direction of my supervision as they had informed me to work
8 with Ms. Wright.

9 Q. With respect to the ex parte hearing with the judge
10 that's described in paragraphs 38 and 39 of your Declaration,
11 why did you not provide the Court with a copy of the source
12 documents relating to the Bedford County potential Giglio
13 information?

14 A. Sir, it was my understanding from my communications with
15 Ms. Wright and supervision that I could only provide those
16 upon request from the Court and further documentation --

17 THE COURT: How was I supposed to know what you had?

18 THE WITNESS: I understand that, sir.

19 We thought that we had laid it out in the document
20 that there was additional documentation and then when it was
21 requested for the Botetourt information --

22 THE COURT: My recollection of that hearing was like
23 -- was the word "flirtatious" used there?

24 THE WITNESS: Not at the hearing. It was used in the
25 ex parte motion, sir.

1 THE COURT: That this was something, sort of an
2 innocuous sort of thing, something unseemly, but no big deal.

3 THE WITNESS: I'm sorry, sir.

4 THE COURT: It didn't seem it was something you all
5 took as a very serious matter.

6 THE WITNESS: Again, sir, I was advised I needed to
7 provide a summary of the information and we thought we were
8 conveying the nature of the conduct.

9 THE COURT: Well, you were asked this by Mr. Beers,
10 but where did the word "flirtatious" come from?

11 THE WITNESS: It was in order to try to relay the
12 nature of the conduct.

13 THE COURT: It could be said to deceive the nature of
14 the conduct. This was not friendly conduct on both persons'
15 part, was it?

16 THE WITNESS: On either of them?

17 THE COURT: On one of them.

18 I don't know whether it was friendly or not on his
19 part, but apparently EC didn't take it as friendly.

20 THE WITNESS: As what she described, sir. I can only
21 go off of what she described, sir, yes, sir.

22 THE COURT: She had been interviewed.

23 THE WITNESS: That is correct.

24 THE COURT: I mean, she thought it was bad enough she
25 even considered recording it.

1 THE WITNESS: The second time around, she advised us
2 at the second meeting she considered recording it in case
3 anyone ever questioned her about it.

4 THE COURT: Go ahead.

5 BY MR. MOUNTCASTLE:

6 Q. Ms. Neese, I guess the Court wants to know who came up
7 with the word "flirtatious"?

8 A. I used that in the draft motion because I was advised I
9 needed to describe the nature of the conduct, but not use
10 necessarily -- or it was my understanding not to use
11 embarrassing language in case the ex parte designation was
12 removed and the documentation was unsealed, sir.

13 Q. So you came up with the word "flirtatious"?

14 A. That is correct.

15 Q. Why did you think that was sufficient to convey the
16 nature of the conduct?

17 A. It was regarding their -- I was trying to convey that it
18 was sexual in nature conduct. I didn't use the word
19 "sexual." I just used flirtatious because I thought that
20 would convey it and once it was reviewed by others and not
21 changed, I thought we were conveying what the nature of the
22 conduct was, sir.

23 Q. At the ex parte hearing, can you state -- you said, I
24 think, in your Declaration, you had Officer Cook available to
25 provide the Court with additional information. Why did you

1 not offer him to the Court at ex parte hearing?

2 A. It was my understanding that I needed to make him
3 available if additional questions were asked. I'm a line
4 AUSA who did not interview him about this. Nor did any
5 federal agent that I'm aware of interview him about it and
6 essentially, my understanding was that it would make him
7 available and we would answer any questions of the Court.

8 Q. So you didn't believe that you had an obligation to
9 actually offer -- affirmatively put Officer Cook on the stand
10 to explain or describe that conduct?

11 A. I didn't believe I had the authority to do that and I
12 didn't believe I had the right to do it without the Court
13 requesting it, sir.

14 Q. What was the basis of that belief?

15 A. My communications, sir, with my Giglio officer and the
16 way things had been handled in other cases I was not a part
17 of in this jurisdiction.

18 Q. Paragraph 43 of your Declaration where you describe the
19 drafting of the letter to defendant's counsel in response to
20 the Court's May 2014 order, again, I'm going to show you a
21 document which I marked as Government 36A.

22 Can you identify it?

23 A. Yes, sir. It is the track-change version of a revision
24 of the disclosure letter that I had drafted for Mr. Snook
25 that I received back from Elizabeth Wright. She made the

1 track changes.

2 Q. Did you do the original draft of the description of the
3 summary of Officer Cook's misconduct with the witness?

4 A. Yes, sir.

5 Q. How did you go about drafting that?

6 A. From my conversations and understanding, I would use the
7 same summary that I had provided to the Court in the ex parte
8 motion.

9 Q. And did you understand the Court had ordered the
10 disclosure of the behavior?

11 A. That's what the order said, yes, sir.

12 Q. What was the basis for your belief that providing the
13 same information or the same description you had provided to
14 the Court was sufficient for the disclosure to the
15 defendants' counsel?

16 A. My understanding from my communications with my Giglio
17 officer was that that was -- the summary was essentially like
18 what she had seen in the past happen and that I was supposed
19 to make that disclosure to Mr. Snook as well.

20 Q. Did you provide the draft to Ms. Wright?

21 A. Yes, sir, I did.

22 Q. Did she review it and provide you with some proposed
23 changes or edits?

24 A. Yes, sir, and that's Exhibit 36A we're discussing.
25 Those were her edits.

1 Q. Did she propose any substantive changes to the
2 description of the potential Giglio information pertaining to
3 Officer Cook from Bedford County?

4 A. No substantive changes were proposed, sir.

5 Q. What effect, if anything, did that have on your
6 understanding of the letters and summary of the letter's
7 insufficiency?

8 A. My understanding was the discovery letter was sufficient
9 to comply with my discovery obligations as well as comply
10 with the Privacy Act.

11 I was not trying to mislead Mr. Snook or the Court in
12 any way. I was trying to comply with both my discovery
13 obligations and the Privacy Act obligations as it had been
14 relayed to me.

15 Q. Ms. Neese, at any time during your handling of this
16 potential Giglio information, Officer Cook's misconduct with
17 the witness, was it your intention to minimize or deceive the
18 Court or to conceal that information?

19 A. No, sir, it was not. I was trying to, as I've stated
20 multiple times, I was trying to comply with my discovery
21 obligations, but also with what I was being informed about
22 the Privacy Act. I did not want to violate the Privacy Act
23 because I'm an Assistant United States Attorney employed by
24 the Department of Justice.

25 MR. MOUNTCASTLE: Your Honor, that's all the

1 questions I have.

2 MR. BEERS: Your Honor, I'm going to be brief, Judge.

3 The Court, can I do that? Thank you, Your Honor.

4 REDIRECT EXAMINATION

5 BY MR. BEERS:

6 Q. Ms. Neese, you mentioned these obligations under the
7 Privacy Act and the manual. Can we agree that whatever it
8 says in this manual, when Judge Moon enters an order telling
9 you to disclose Giglio information, impeachment information,
10 that trumps any manual you think you're relying upon? Is
11 that true?

12 A. Sir, my understanding at the time is what I think is
13 important here --

14 Q. What's important is my question and you answering it.
15 My question is, can we agree whatever it said in some manual,
16 doesn't Judge Moon's order trump, supersede the manual?

17 A. I understand that now, but I did not understand that at
18 that time because I was advised I needed to comply with both
19 my discovery obligations and the Privacy Act, sir. I had not
20 been involved in any other Giglio matters of this sort and I
21 was advised by the people who had had those experiences
22 previously.

23 Q. Had you read the briefs filed in this case? There are
24 three briefs.

25 A. I did read them. Not recently. I read them previously.

1 Q. You mentioned the Privacy Act many, many times. Let me
2 just read you though, just pretty clear text.

3 Privacy Act does say, assuming it even applies, in B, 5
4 U.S.C. 552(a): No agency shall disclose any record which is
5 contained in a system of records by any means of
6 communication to any person or to another agency except
7 pursuant to a written request by or the prior written consent
8 of the individual to whom the record pertains unless
9 disclosure of the record would be -- and we turn to 11 --
10 pursuant to the order of a Court of competent jurisdiction.
11 Pursuant to an order of a Court of competent jurisdiction.

12 Can we agree this is a Court of competent jurisdiction?

13 A. Yes, sir, we can, and I was not aware of that at the
14 time.

15 Q. Yeah.

16 So the Privacy Act has nothing to do with this case,
17 once Judge Moon entered his ex parte order telling you people
18 to give this information about his behavior, the evidence of
19 Cook's behavior with respect to EC to Mr. Snook; right? The
20 Privacy Act has nothing to do with it anymore. It's an order
21 of a Court of competent jurisdiction; correct?

22 A. Sir, I have not read that document. Based on what
23 you're saying, yes, sir, but I did not know that at the time
24 because I was not aware of that. I was only aware of what I
25 was being --

1 Q. You're just up here testifying about statutes you've
2 never read; right?

3 A. Sir, I'm testifying about what my understanding was and
4 what was informed to me.

5 Q. Now, you keep saying, ma'am, gee, you had never been
6 involved with Giglio issues or Brady issues before.

7 A. I had limited experience, virtually none, as of May of
8 2014.

9 Q. Haven't you had many, many cases, drug cases, in your
10 eight years or whatever it was you'd been practicing?

11 A. Up to this point, I'm a little over seven-and-a-half
12 years, and I have had.

13 Q. You've been trained on Brady material, right, Brady
14 doctrine; correct?

15 A. Sir, I have received a two-hour Department of Justice
16 training per year.

17 Q. You were out signing orders. We already went through
18 this, document 172. You agreed to comply with your
19 obligations under Brady and those obligations, you agreed,
20 entail providing any evidence of an exculpatory nature.

21 A. Sir, again, I was never informed that this was
22 exculpatory evidence. Nor did I believe it was exculpatory
23 evidence. We believed it was potential impeachment evidence
24 under Giglio, which is not the Brady decision.

25 Q. So, have you not turned over exculpatory material or

1 impeachment material in prior cases?

2 A. We're talking about law enforcement officers.

3 Q. My question is, have you turned over exculpatory

4 material to defense counsel in other cases?

5 A. Yes, sir.

6 Q. Right. And you don't turn over some little summary that

7 talks about flirtation. You turn over the real deal, right?

8 You turn over the real evidence that's exculpatory: FBI

9 reports, interview reports; right?

10 A. Sir, those aren't real evidence. Those are also just
11 documentations of what the agents say, just like the
12 documentation we would write down, yes, sir.

13 Q. Those are underlying source materials; correct?

14 A. Correct.

15 Q. This is the first time you tried to comply with Brady
16 obligations or Giglio obligations by sending just a letter.
17 Isn't that true?

18 A. Sir, I've submitted e-mails before as well to defense
19 counsel when there was -- when we did not have either a
20 report from a law enforcement officer based on the conduct,
21 so I've submitted it other ways as well, sir.

22 Q. Here, you did have reports from law enforcement
23 officers. That's the point. Let's go through it real
24 quickly. You had the FBI reports or notes, which were
25 available to you. Secondly, you had the Bedford County

1 documents, which were available to you and your Giglio
2 officers; correct? You had those?

3 A. Sir, if I could please explain.

4 The FBI report, I did not have that available to me.
5 That was my supervision who was communicating with the FBI
6 and it's my understanding that neither the Giglio officers
7 nor my supervision obtained either Mr. Emmerson's notes or
8 his report, and I'm not allowed to ask for that information.

9 Regarding the Bedford County documentation, I did
10 receive the personnel file information on May 8, 2014, from
11 Elizabeth Wright.

12 Q. Right. And unlike your normal course, you decided not
13 to give that to Burns' lawyer, not to give that information;
14 right?

15 A. Sir, as I've previously explained, I followed what my
16 understanding was from the information that was provided to
17 me and the guidance that was provided to me.

18 Q. You were asked over and over again about your
19 Declaration and you went through most of the paragraphs, I
20 think. I'm going to ask you about one section, ma'am, that I
21 think was skipped. I'm not sure, but it's paragraph 40,
22 which is your understanding of Judge Moon's order; okay?

23 You said, paragraph 40, page 13 of your Declaration, on
24 May 14, 2014: After the ex parte hearing, the Court issued
25 an order finding that Cook's behavior while employed with the

1 Bedford County Sheriff's Office did tend to impeach and must
2 be disclosed to defense counsel.

3 Right? Did you at any time go back to Judge Moon and
4 say, hey, can we just send him a letter, send Snook a letter?
5 Did you ever ask permission from the judge on that?

6 A. No, sir. I submitted it to my Giglio officer, Elizabeth
7 Wright, and followed her advice.

8 Q. Did she tell you to "cc" or to send a copy to the Court
9 so the Court could see it?

10 A. No, sir.

11 Q. The Court thought you had done what you were supposed to
12 do; provide the evidence, the exculpatory impeachment
13 evidence, didn't he?

14 A. Sir, again, we did not classify this as exculpatory
15 evidence because it had nothing to do with Mr. Burns or Mr.
16 Burns' conduct during the Pain Train investigation.

17 Regarding impeachment evidence, sir, I did not go back
18 to the Court because I followed what I was guided to do, sir.

19 MR. BEERS: Thank you, Your Honor.

20 THE COURT: Anything else?

21 MR. MOUNTCASTLE: No, Your Honor.

22 THE COURT: Thank you.

23 Will there be any other evidence?

24 MR. BEERS: Can I talk to him for a second, Judge?
25 (Counsel conferred with the defendant).

1 Call Ms. Wright, Elizabeth Wright.

2 THE CLERK: Did you move for the admission of 36A?

3 MR. MOUNTCASTLE: I meant to, Your Honor.

4 Do you have any objection to that, Paul?

5 MR. BEERS: No.

6 (Government's Exhibit 36A was marked for
7 identification and admitted into evidence).

ELIZABETH WRIGHT, CALLED AS A WITNESS BY DEFENSE, SWORN

DIRECT EXAMINATION

10 BY MR. BEERS:

11 Q. Tell the judge your full name, please.

12 A. Elizabeth Wright, W-R-I-G-H-T.

13 Q. What do you do for a living, ma'am?

14 A. I'm currently a trial attorney with the U.S. Department
15 of Justice in Washington, DC.

16 Q. Where did you go to law school?

17 A. I went to Yale law school.

18 Q. What did you do after going to Yale law school?

19 A. I clerked for two years and then worked at a law firm in
20 DC and San Diego for three-and-a-half years. Then after
21 that, I was a Special Assistant U.S. Attorney in Roanoke at
22 the U.S. Attorney's office for one year and then an Assistant
23 U.S. Attorney in the Harrisonburg office.

24 Q. So did you clerk for a circuit court or District Court?

25 A. One year of each.

1 Q. What circuit?

2 A. The Ninth Circuit in Pasadena, California. Before that,
3 I was with the district court in Los Angeles.

4 Q. Can we agree -- you are the Giglio officer; is that
5 right?

6 A. One of them, yes.

7 Q. Were you the Giglio officer come 2014, who was in charge
8 of this case?

9 A. I was assisting the AUSAs on it, yes.

10 Q. Did you tell Ashley Neese she needed to make an ex parte
11 motion regarding Investigator Cook?

12 A. When the inquiry first came to me, it was already
13 presented that AUSA Neese did need to make an ex parte
14 disclosure, so my task was to gather information from two
15 different offices in support of that analysis and go-bys,
16 sort of general filings for AUSA Neese to follow and present
17 the information and continue to work with her as she was
18 working on the disclosures.

19 Q. I thought it was -- maybe I misunderstood. I thought it
20 was your idea, it was your advice, it was your counsel not to
21 just give this information to defense counsel, but to go to
22 the judge with an ex parte motion. Wasn't it your idea?

23 A. No. Initially, AUSA Jacobsen had sent me an e-mail in
24 December, 2013, looping me in and saying AUSA Neese needed to
25 file an ex parte motion, could we get that rolling. We did

1 additional follow-up gathering the information. Once the
2 information came in, we were providing it to supervisors and
3 it remained clear that an ex parte filing was appropriate.
4 So we worked along on that process.

5 Q. Did you identify this as Giglio material?

6 A. Potential, yes.

7 Q. Did you see the FBI typed report? Did anyone get that to
8 you?

9 A. No.

10 Q. Did you know the FBI interviewed this woman -- we'll
11 call her EC -- about Investigator Cook's sexual misconduct?

12 A. I knew that there had been a session with AUSA Neese and
13 I believe I recall there were agents involved in that, but
14 did not know of any other report at all about that until the
15 appeal was pending.

16 Q. Did you ask for the FBI's reports of their notes of that
17 interview?

18 A. I asked if there were any other reports and was told
19 there weren't any.

20 Q. Who told you there were no other reports when you asked
21 if there were any other reports? Was that Ms. Neese?

22 A. I don't remember specifically. It was a combination of
23 --

24 Q. Come on. You don't remember who told you there were no
25 other reports?

1 A. At that point, we were -- I was talking to AUSA Neese
2 and a bunch of supervisors. So it was some combination of
3 AUSA Neese and Thomas Cullen.

4 Q. They all told you there were no FBI reports.

5 A. Part of that conversation, yes.

6 Q. Did you call the FBI yourself and verify whether there
7 were any FBI reports?

8 A. No, I did not.

9 Q. Did they tell you the FBI was sitting there taking notes
10 during the interview?

11 A. Not that I recall.

12 Q. Wasn't it your understanding the reason the FBI was
13 there taking notes at the interview was because the U.S.
14 Attorney asked them to?

15 A. I don't remember having any specific understanding of
16 that. I knew the U.S. Attorney's office through AUSA Cullen
17 and AUSA Neese had proceeded to have an interview and had
18 given that information to Bedford County.

19 Q. How did the FBI get to the table? This was an ATF
20 investigation. Wasn't it the U.S. Attorney's idea to bring
21 in the FBI?

22 A. I don't actually know. I wasn't involved in the case at
23 that time.

24 Q. Did anyone tell you that this guy, Investigator Cook,
25 grabbed this lady, EC, pulled her across the console of her

1 car and bruised her knee? Did anybody tell you that?

2 A. I was not aware -- no, I didn't know any sort of
3 aggressiveness in the contact between the two of them.

4 Q. I'm sorry. You didn't know about any aggressiveness
5 between the two of them?

6 A. In terms of pulling over to bruise the knee.

7 Q. Yeah.

8 A. I knew what was in AUSA Neese's notes.

9 Q. You just said you didn't know of any aggressiveness by
10 Investigator Cook to that grand jury witness. Is that what
11 you said?

12 A. Yes.

13 Q. Did you know he pulled out his penis and started
14 masturbating in front of her?

15 A. I knew from AUSA Neese's notes that his penis was
16 displayed, yes.

17 Q. She told you that.

18 A. I don't remember speaking to her about it, but I saw it
19 in one of the responses from the sheriff's office.

20 Q. So Neese never told you that the guy pulled out his
21 penis and started playing with himself. She never told you
22 that.

23 A. I don't remember having any conversation with her about
24 it, but it was reflected in her notes that his penis was
25 displayed.

1 Q. I will tell you it's not reflected in any sheriff's
2 department notes. So, where did you get that information?
3 You're saying from her notes?

4 A. Yes, that were sent to me from the sheriff's department
5 files.

6 Q. Now, did you know that she -- that Investigator Cook
7 lied to EC and said he was not married. Did you know that?

8 A. That was on the notes. The conversation where EC said
9 that she had asked Investigator Cook if he was married and he
10 said no was on the notes as well.

11 Q. You knew that was a false statement, didn't you?

12 A. Through the investigative file, that was apparent, yes.

13 Q. Did you think that was Giglio material, the fact he
14 would lie to a grand jury witness?

15 A. I believe that was in the information that I summarized
16 as part of the potential Giglio material. I mentioned that
17 part in there. We were also throughout the process needing
18 to be sensitive to Privacy Act, the fact it was personnel
19 file information, and we were thinking about what could be
20 admissible at trial.

21 In the course of the process, that wasn't something I
22 focused on.

23 Q. Is that a yes or no, when a officer lied to a grand jury
24 witness?

25 A. It's a potential.

1 Q. What about the fact when he lied and said to her all of
2 a sudden, you're likely to be arrested and not only that,
3 when you're arrested, I'm going to be the guy to come there
4 and strip search you in your house.

5 Did you think that was Giglio material?

6 A. I don't remember thinking anything about that at the
7 time. My understanding was EC was involved in the
8 investigation and was a witness, so at the time nothing
9 struck me particularly about whether he was telling her the
10 truth or not about what could happen to her in that
11 investigation.

12 Q. But it's your understanding that she was never likely to
13 be arrested. She was never a target. That was a lie on his
14 part; right? She was a witness.

15 A. I actually don't have a specific understanding of that.
16 I don't know what the substance of the investigation was as
17 to her.

18 Q. So Ms. Neese or her colleagues, Mr. Jacobsen -- I don't
19 know. It's dizzying, all these people. Nobody told you
20 about that.

21 A. A conversation about the strip search and arrest was in
22 the notes, so I had seen something about that at the time.
23 But my understanding was she was a witness in this
24 investigation. She had testified in grand jury, but I didn't
25 have occasion to get involved in the specific facts about the

1 likelihood of her being a witness or what her otherwise
2 status in the investigation was.

3 Q. I'm not asking you whether she was a witness. She's
4 obviously a witness. That's how this whole thing started;
5 right? She testified in front of the grand jury; right?

6 A. Yes, that's my understanding.

7 Q. I'm asking, are you aware that he tried to mislead her
8 on the second occasion? Cook tried to mislead this lady on
9 the second occasion by saying, guess what? Now you're likely
10 to be arrested.

11 A. I don't know anything about whether that was misleading
12 or not.

13 Q. Then you advised Ms. Neese and her colleagues to write
14 up some ex parte motion and you participated in the drafting,
15 in fact; right?

16 A. Well, the decision to write up the ex parte motion was
17 decided sort of as the group with the supervisors on that as
18 well. But yes, I looked at a draft when she sent that back
19 and was generally advising on the process.

20 Q. This is what's filed and shown to the Court, to Judge
21 Moon; right?

22 A. Yes.

23 Q. The ex parte motion says the witness admitted that
24 during the encounters with Cook, she and Cook had been
25 flirtatious and had even engaged in kissing.

1 You wrote that; right?

2 A. No.

3 Q. That's not true though, is it? The witness admitted that
4 during the encounters with Cook, she and Cook had been
5 flirtatious. We've been over this this morning. I know you
6 were excluded, but isn't it true that none of the reports
7 you've seen did she admit she and Cook were flirtatious? Did
8 you see an admission by her that they were flirtatious?

9 A. The only information I had seen that came from EC was
10 what was reflected in AUSA Neese's notes. She initiated
11 contact with the U.S. Attorney's office through her attorney
12 and they had run through these incidents. So it is my
13 understanding that she did admit to them there had been these
14 two incidents in December and described them as reflected in
15 the notes.

16 Q. Is that your answer?

17 Here's my question. Did you see the word "flirtatious"
18 in these notes that you received from Ms. Neese?

19 A. No, I don't recall that note being in there.

20 Q. Trust me. It's not in there.

21 So, why did you write here the witness admitted during
22 the encounters she was flirtatious? Why did you do that?

23 A. I didn't write that, sir. I reviewed what was written
24 and submitted to me by AUSA Neese as a summary of the
25 information.

1 Q. You could have told the judge the whole story; right?
2 That's generally what you're supposed to do if you're going
3 to go in and ask for a ex parte proceeding, correct, be
4 forthcoming with the Court; right?

5 A. Yes, and we made clear in the filing that all the
6 information and back-up filings would be available for the
7 Court to review if the Court so desired.

8 Q. I'll tell you there's nowhere in this ex parte motion
9 where any documents are described concerning Bedford County
10 or there's any invitation to review Bedford County documents.

11 MR. MOUNTCASTLE: Objection. I think it's not a
12 question, number one, and I think it's patently wrong.

13 MR. BEERS: It's not patently wrong, but I'll go on,
14 Judge.

15 BY MR. BEERS:

16 Q. Now, you were concerned with the Privacy Act? I read
17 your Declaration. You were concerned about the Privacy Act
18 implications?

19 A. Yes. The privacy and confidentiality of sensitive
20 Giglio information as to law enforcement and other witnesses
21 is something we are directed by DOJ policy to consider in the
22 Giglio analyses.

23 Q. Judge Moon had the ex parte proceeding at your request.
24 Did you show up?

25 A. No.

1 Q. So, they had their ex parte proceeding. He considered
2 it. He weighed what he was told, right, and he issued an ex
3 parte order; correct?

4 A. Yes.

5 Q. We can agree this is a Court of competent jurisdiction;
6 right?

7 A. Yes.

8 Q. We can agree the Privacy Act says in B11 that there's no
9 bar, certainly, under the Privacy Act to disclosing
10 information pursuant to an order of a Court of competent
11 jurisdiction; correct?

12 A. Yes, that's correct.

13 Q. So at that point, did you advise Ms. Neese to give the
14 evidence, not a summary now, but the actual source documents,
15 the ones that you and she had been looking at, the ones you
16 had the chance to evaluate, did you tell her you need to give
17 that to Mr. Snook so he can have a chance to evaluate its
18 probative value and admissibility?

19 A. Our understanding was -- the standard practice of --

20 Q. Is the answer no? You can explain, but is the answer,
21 just for the record, no?

22 A. No, we did not give that to him.

23 Q. You didn't advise her to, did you?

24 A. No. We understood -- the information was disclosed.

25 Our practice was it would generally track what had generally

1 been disclosed to the Court as a summary of the information.
2 What had happened in other cases and what we anticipated was
3 that if he had any interest in seeing the background
4 documents, which it was clear there were some, and doing
5 anything with the information at trial, that he would request
6 them.

7 Q. So, you told the judge half the truth. So then you get
8 by with that. So, now you're going to tell the lawyer the
9 half the truth; right?

10 A. The intent was to disclose everything we could that was
11 appropriate and then have the other information available
12 upon request in other to be sensitive to not violating the
13 Privacy Act.

14 Q. As a good Giglio expert, you know there's no duty upon
15 Judge Moon to ask for any documents; correct?

16 A. That's correct.

17 Q. There's no duty on the part of defense counsel to ask
18 for any particular documents. You're supposed to disclose
19 the behavior.

20 A. Right, and we believed we did that through the summary.

21 Q. By telling Mr. Snook that she had admitted to being
22 flirtatious and they had even kissed; right?

23 A. And that he was disciplined, and all the other
24 information that was in that summary.

25 Q. You didn't tell them anything about his penis being

1 waved around the car or being grabbed and being thrown
2 against the console.

3 A. Any grabbing or throwing against the console, I didn't
4 know anything about, but no, there was nothing in the
5 specific summary talking about these.

6 Q. So he didn't have the benefit of evaluating Cook's lies;
7 right? Do you remember about the lies? "Are you married,
8 sir? No, I'm not married."

9 A. That was not in the summary, no.

10 Q. And the thing about you're now a target, likely
11 arrested, going to be arrested, probably I'm going to be the
12 one doing the strip search. That wasn't in it; right? You
13 didn't tell Cook that?

14 A. No.

15 Q. And that was on your advise. Is that true? It wasn't
16 Ms. Neese's decision. It was your decision not to tell Snook
17 all that.

18 A. The Giglio responsibilities are the AUSA's ultimate
19 responsibility, but we advise. I told her about the specific
20 practice and we had recently had experiences where items were
21 incorrectly submitted without being under seal and not ex
22 parte. So we were trying specifically to be protective of
23 the information in order not to run afoul of the protections
24 we needed to accord it.

25 Q. Did you advise her to go and ask Judge Moon for

1 permission just to write a summary and not give the defense
2 counsel the actual documents, the ones you all had the
3 benefit of evaluating? Did you advise her to go back and
4 clear that with Judge Moon?

5 A. No. We understood that based on the district's
6 practice, having summarized the information, that would be
7 sufficient to disclose that information to the defense as
8 well and the defense attorneys would inquire if they had any
9 interest in making additional requests.

10 Q. So someone told you that's the practice in this
11 district, not to provide the evidence, but just to provide a
12 summary? Someone told you that in this district? Who told
13 you that?

14 A. If there had been exculpatory evidence, that would have
15 been provided. Here, there was arguable potential Giglio
16 material and we were providing the gist of that material and
17 enough substance to convey the sexual nature, the discipline
18 and other aspects of that conduct to enable the
19 determination.

20 Q. Two questions. First of all, I thought you said it was
21 your understanding this district practices not to give the
22 defense counsel the actual documents, the ones that you have,
23 the ones you get to look at and Ms. Neese gets to look at,
24 evidence, but to do a summary. Did someone tell you that was
25 the practice in this district?

1 A. It depends on the type of case. In a variety of cases,
2 we would fully disclose the information. In this case, we
3 were sensitive to the need to protect personnel files, partly
4 to keep lines of communication open and to disclose
5 information only legally required to do so. When we had done
6 this ex parte type procedure, it was standard practice to
7 disclose to the Court and then defense attorney the same
8 thing in order to give them the understanding of what the
9 circumstances were.

10 Q. You keep saying potentially Giglio, potentially
11 impeachment, potentially discoverable. But wasn't that all
12 over when Judge Moon said, citing Fourth Circuit law, this
13 tends to impeach, it must be disclosed, it's Giglio? Why are
14 you saying it's potential anymore when the judge told you it
15 was Giglio material, impeachment material and needs to be
16 disclosed? Why are you saying potential anymore? He ordered
17 you to do it.

18 A. He ordered disclosure of the behavior and my
19 understanding is we had summarized the behavior and given
20 necessary information from that and there isn't a right to
21 review sort of full employment files of any law enforcement
22 witnesses. So we were disclosing the substance of the
23 material that could potentially be used at trial, is what we
24 were believing we were doing.

25 Q. Even though he told you to disclose it, you decided not

1 to disclose all of it, but just to disclose a little bit of
2 it. Is that fair?

3 A. We were trying to comply with the order and disclose
4 what the substance of the behavior had been.

5 Q. Can we agree, ma'am, this letter you wrote for Mr. Cook
6 (sic) that says she admitted to being flirtatious and they
7 even kissed or something and that he had been consuming
8 alcohol, that's not evidence in that letter. That's not
9 evidence. That's just a summary; right?

10 A. I didn't write that summary. I reviewed it later, but
11 yes, that's a summary. But the obligation was to disclose
12 the Giglio information --

13 Q. Is that evidence --

14 A. -- that could potentially be used against him and
15 additional information could be provided if the defense
16 attorney had requested it.

17 Q. That's not evidence, the letter.

18 A. No, the summary was not evidence.

19 Q. Did you take a look at Judge Moon's order that your
20 colleague, Ashley Neese, endorsed and agreed? This is the
21 joint inspection and discovery order from January. Let me
22 just read this to you. Does this not refresh your
23 recollection?

24 A. I don't think I ever saw that in this case, but there
25 were standard filings in that regard across the district.

1 Q. You've seen this before, haven't you?

2 A. Not the specific one in this case, but the general --

3 Q. It is further ordered that the United States provide to
4 the defendant any evidence of an exculpatory nature as
5 defined in Brady v. Maryland and those cases interpreting
6 that opinion. Right? That's an order of the Court.

7 A. Yes.

8 Q. And you didn't do that.

9 A. I believe we did. Also, there are Giglio and Brady --
10 for the Giglio information, this is impeachment rather than
11 -- there was nothing exculpatory I was aware of throughout
12 this case. This was impeachment information on a specific
13 witness.

14 THE COURT: Did you think that I didn't want you to
15 reveal impeachment evidence?

16 THE WITNESS: We certainly did, Your Honor, but
17 during -- we were also trying to be sensitive --

18 THE COURT: Wasn't there a dance going on here to
19 really deceive the Court and have the Court not appreciate
20 what was going on with Officer Cook?

21 THE WITNESS: There was no advantage. The full
22 intent was to have you understand what was going on.

23 The practice --

24 THE COURT: How was I to know? Is there any place in
25 there in what you revealed to me that he had told her she

1 would be arrested, which was a false statement, and that he
2 would come and do a strip search?

3 THE WITNESS: I didn't know anything whether it was
4 false or not -- anything about the background of her being --
5 the likelihood of being arrested in the case. But the reason
6 that the initial full file of documents wasn't filed was that
7 we were concerned about the Privacy Act and --

8 THE COURT: Aren't you more concerned about the
9 Constitution than the Privacy Act?

10 THE WITNESS: We certainly are more concerned about
11 the Constitution, Your Honor, but we thought that we were
12 protecting all relevant interests in providing the summary
13 and making the background documents available. Any statement
14 about the arrests or likelihood, I didn't focus on at the
15 time. I didn't really know enough about the facts of the
16 case to appraise whether she was a likely target or not.

17 THE COURT: Isn't one of the big things whether the
18 witness has lied? Wasn't the lies a big problem here?

19 THE WITNESS: In the Giglio inquiries, we're
20 traditionally focused on -- and in the Giglio questions,
21 we're focused on sustained findings of misconduct and
22 findings pertaining to truthfulness and bias. Something that
23 was significant to me in clear response to this case --

24 THE COURT: Just a little hugging and kissing is not
25 nearly as bad as a witness saying you're going to be arrested

1 and I'll come to your house and do a strip search.

2 Take on the one hand, a little hugging and kissing
3 and on the other hand, the witness saying I'll come -- you'll
4 be arrested and I'll come to your house and do a strip
5 search, which is the most important?

6 THE WITNESS: The credibility issues are what we were
7 primarily focused on. What had struck me in part about this
8 case, and we did include as well, is that Investigator Cook
9 was fully open and the people who investigated it from the
10 sheriff's office and looked into it thought he was completely
11 open and forthcoming with them and that there was no issue as
12 to credibility as to Investigator Cook.

13 What we are traditionally asking for through the
14 Giglio inquiry is filings of misconduct, which we identified
15 and disclosed, but then implications for truthfulness or bias
16 and here, the investigators and the folks who had actually
17 looked at that were very clear and adamant in their response,
18 and we quoted some of that, too, that Investigator Cook had
19 been open and honest with them about what had happened.

20 THE COURT: He was open and honest with the sheriff,
21 but the question is, did he tell a lie to the witness.

22 THE WITNESS: The question that we focus on is the
23 official findings and not looking -- the information that we
24 got in this case was vastly more than we typically have
25 access to for law enforcement officers. Typically, we're

1 limited to learning about sustained findings. That's what
2 our --

3 THE COURT: This matter came up at trial. Mrs. Neese
4 said, Judge, you know all there is to know. Did I know? Is
5 there any way I would have known -- maybe I could have known.
6 Maybe I should have taken over the ex parte hearing and gone
7 deeper into it, but I didn't do it. She knew I didn't do it.
8 She knew I accepted her presentation. So when it came to the
9 time they wanted to cross-examine the witness, I did not know
10 and I don't know how anyone could think that I knew that he
11 had told the witness "you will be arrested and I'll come to
12 your house and strip search you."

13 THE WITNESS: The statements about her likelihood of
14 being arrested or not were not anything I focused on. I
15 didn't know the facts of the case in terms of that, but our
16 intent was to provide the information that was Giglio
17 information, while still trying to protect the privacy, as we
18 were required to do, of witnesses. That was why we hadn't
19 immediately filed, basically, all of the background
20 documents, because we also are trying to encourage local law
21 enforcement officers to share this information with us, which
22 they aren't required to do so. Part of that is only
23 disclosing the information and going through the ex parte
24 process to only disclose what we're legally required to
25 disclose.

1 THE COURT: You had the information from the lawyer
2 of EC.

3 THE WITNESS: I had -- the only part of that I --

4 THE COURT: You didn't need the Bedford County
5 report, sheriff's report, to know what the attorney for EC
6 had already turned over to your office.

7 THE WITNESS: That's correct, Your Honor. I don't
8 remember if I had seen the notes before they had came back in
9 the Giglio request response, but yes, the office did have the
10 notes from EC.

11 I'm sorry, Your Honor. I may not have understood your
12 question.

13 THE COURT: Okay. Go ahead, Mr. Beers.

14 BY MR. BEERS:

15 Q. Just briefly.

16 So, you keep saying Ms. Neese never told you, nobody
17 ever told you that the guy tried to mislead this woman for
18 his own designs, his own purposes, by telling her all of a
19 sudden "you're likely to be arrested and I'm the one that's
20 going to arrest you and strip search you."

21 That's news to you. That's your testimony.

22 A. I had seen the discussion of that in the briefing of
23 this case, but at the time, I don't remember having any
24 focus on the status of any investigation or on that statement
25 to her.

1 Q. If you had known that, if they had told you that, ma'am,
2 as the Giglio officer, would you have told them "you tell
3 that to Judge Moon"?

4 A. We still would have had to go through, in order to
5 comply with DOJ policy, to appraise -- it came from a
6 personnel file, so something additional to verify --

7 Q. It didn't come from a personnel file.

8 THE COURT: Don't y'all have ex parte hearings with
9 judges and disclose secret information, things that have been
10 classified secret?

11 THE WITNESS: I haven't personally been involved in
12 any of those, Your Honor. I had been personally involved in a
13 previous ex parte Giglio hearing where we submitted a variety
14 of information and then it was not going to stay under seal.
15 That was part of what was informing our treatment of the
16 documents here because the court in that case had not wanted
17 to have the Giglio proceeding, either ex parte or under seal,
18 and was taking steps to make the entire proceeding public
19 initially when we had submitted this information for
20 consideration by the Court. So we were concerned and trying
21 to protect against that so we weren't inappropriately
22 disclosing information.

23 THE COURT: You're in a situation, it seems, Mr. Cook
24 becomes -- everyone is trying to protect Mr. Cook and losing
25 sight of the fact that he's going to testify in a trial and

1 this information is important as to his credibility.

2 THE WITNESS: We weren't trying to protect Mr. Cook.

3 We were trying to follow DOJ procedures that were requiring
4 this balancing of potential impeachment.

5 THE COURT: Is there any place in the Department of
6 Justice where someone stops and says, hey, the Constitution
7 overrides our rules?

8 THE WITNESS: The Department of Justice policy is to
9 provide even broader discovery procedures than the
10 Constitution requires, but we also are tasked with balancing
11 that against other issues, such as the Privacy Act.

12 THE COURT: Once you get a Court order, doesn't the
13 balancing act end, if the judge makes a decision? How do you
14 go back and balance some statute or some policy with your
15 requirement to obey the Court's order?

16 THE WITNESS: At that time, Your Honor, we didn't
17 understand the order to be more expansive than the behavior
18 as it had been summarized to the Court. And the way we
19 typically had done that in our cases was to provide the same
20 summary to the Court, conveying the substance of the
21 information, and that would naturally be provided to the
22 defense attorney. So there wasn't a separate balancing at
23 that time after the Court's order.

24 MR. BEERS: Two or three more questions, Judge.

25 Thank you.

1 THE COURT: Any other questions?

2 MR. BEERS: Just three more, yes, Your Honor, a
3 couple more?

4 THE COURT: Of this witness.

5 MR. BEERS: Yes, sir, just a couple.

6 BY MR. BEERS:

7 Q. You said something about a personnel file. We can agree
8 the interviews on April 15 and 16 with Ms. Neese and then the
9 FBI and the ATF, okay, of EC, those interviews, that's not
10 personnel files. That's FBI work and ATF work and U.S.
11 Attorney investigation; right?

12 A. What I had seen was just from the personnel file and
13 that contained the notes. I wasn't aware of any other reports
14 about that, but yes, the AUSA's notes themselves were in the
15 possession of the U.S. Attorney's office rather than wholly
16 in the personnel file.

17 Q. You mean, you saw Ms. Neese's notes when you got them
18 from the Bedford County Sheriff's Department; right?

19 A. Yes.

20 Q. Obviously, Ms. Neese doesn't work for the Bedford County
21 Sheriff's Department. That's not a personnel document, is
22 it? That's your document.

23 A. It's a U.S. Attorney office document, yes.

24 Q. Isn't it black letter Giglio, Brady, juris prudence,
25 that impeachment material must be turned over and it's

1 considered exculpatory?

2 A. There's a materiality standard on that and we were
3 attempting to balance that with the need to respect the
4 witness's privacy.

5 Q. You thought you were free to do that, needed to do that
6 even after Judge Moon entered his ex parte order. You still
7 needed to engage in balancing; right?

8 A. Right, not disclose items that weren't required to be
9 disclosed, yes.

10 THE COURT: I take it you wouldn't have disclosed it
11 to me. You didn't -- after I ordered what should have been
12 -- what was included in the order, I gather you would have
13 taken the position before me that I wasn't entitled to it.

14 THE WITNESS: No, Your Honor. We offered up all the
15 back-up documentation to you in the ex parte submission.

16 THE COURT: That FBI document?

17 THE WITNESS: We did not have that FBI document. I
18 didn't see the FBI document or know that it existed until
19 2015 when the appeal was filed.

20 THE COURT: Ms. Neese would have known, wouldn't she?

21 THE WITNESS: My understanding was that she didn't
22 and she had also -- we're always trying to get a document
23 from the agency rather than relying on the attorney's notes.
24 So we had had discussion, including with other supervisors,
25 whether there was an FBI report or document or anything else

1 to submit, describing that and my understanding was there was
2 nothing else we had any access to.

3 BY MR. BEERS:

4 Q. The testimony in this case, the author of the report
5 that Judge Moon just asked you about, says it was done
6 April 18, 2013; okay?

7 A. Okay. I wasn't in the courtroom for that.

8 Q. Fine.

9 Did anyone from your office, the U.S. Attorney's office
10 in Harrisonburg or Roanoke, ask the FBI for either the
11 underlying notes Ms. Neese saw the FBI agent take or his
12 typed up report?

13 A. My understanding was yes, we had, either through AUSA
14 Cullen or AUSA Neese and there had not been a report.

15 Q. Had not been a report. That's what Ms. Neese told you.
16 The FBI said there's no report.

17 A. I don't remember the specific conversation about what
18 she or someone else may have told me about that, but my
19 understanding was all we had was the notes.

20 Q. You didn't have the FBI agent's notes?

21 A. No.

22 Q. Black letter question on Giglio and Brady doctrine.

23 You're responsible, are you not, you, Ms. Neese, your
24 colleagues, U.S. Attorney's office are responsible for
25 searching for and making sure that all reports that are in

1 the hands of the FBI or other federal agencies are produced,
2 collected and produced, either exculpatory or Giglio; right?

3 A. Yes, and we always try to do that.

4 Q. You always try to do that, sort of a collective
5 knowledge doctrine; right?

6 A. Yes, what's known to the officers is imputed to the
7 prosecutors, yes.

8 Q. Very good, what's known to the officers. But what
9 you're telling us is that Ms. Neese told you there's just
10 nothing over at the FBI.

11 A. I don't remember if it was specifically AUSA Neese. It
12 was in the early conversations about the Giglio disclosures.

13 Q. Last question, ma'am.

14 Did you have any discussions with anyone at the U.S.
15 Attorney's office about contacting Staunton River High School
16 or the school authorities about this Investigator Cook who
17 they found a job for him -- did you know that -- as the DARE
18 officer, school resource officer at the high school after he
19 got removed from the team and the investigation?

20 A. There was no discussions, no.

21 Q. Did you have any duty at all to alert the school
22 authorities, this guy, the DARE officer was intoxicated in
23 the car and getting his penis out and is the DARE officer,
24 did you have any duty to do that?

25 A. I'm not aware of a specific duty. I wasn't aware until

1 your filing he was a DARE officer or any other capacity, but
2 the U.S. Attorney's office had disclosed all information it
3 had to the Bedford County Sheriff's Office and they handled
4 it in their disciplinary process.

5 Q. Right. They found a job for him over at the school.

6 A. They suspended him and took other actions.

7 MR. BEERS: Thank you, Your Honor.

8 CROSS-EXAMINATION

9 BY MR. MOUNTCASTLE:

10 Q. Ms. Wright, approximately when you were you assigned to
11 serve as one of the Giglio officers in the U.S. Attorney's
12 office for the Western District of Virginia?

13 A. In approximately October of 2012.

14 Q. So during December, 2013 through May of 2014, the period
15 relevant to this matter, how long had you been a full time
16 AUSA at that time?

17 A. I became a full-time AUSA in September 2012, so about
18 15 months.

19 Q. How long had you been assigned to serve as a Giglio
20 officer?

21 A. About one month fewer than that.

22 Q. What was the training, the specialized training, if any,
23 you received to be a Giglio officer?

24 A. It was just on-the-job training and repeated
25 conversations with my supervisors and AUSA Bockhorst, who had

1 been the Giglio officer for some time before then. I also
2 attended some discovery trainings that were generally
3 available to AUSAs.

4 Q. Did you have any guidance you relied on in performing
5 your duties as a Giglio officer?

6 A. The guidance included the U.S. Attorney's manual and
7 then there were documents received in the course of the
8 trainings on Giglio and Brady.

9 Q. So during the period of time of December 2013 through
10 May of 2014, how would you describe your level of experience
11 as an AUSA and as a Giglio officer?

12 A. I was still relatively new to both and learning the
13 procedures.

14 Q. What do you understand your role to be as a Giglio
15 officer during that period of time, December 2013, through
16 May of 2014?

17 A. We were there to assist AUSAs in receiving and basically
18 to be a conduit for potential Giglio information on law
19 enforcement witnesses and to help, along with the
20 supervisors, to advise on the handling of Giglio inquiries.

21 Q. What did you understand your role to be with respect to
22 pleadings that were prepared for filing with the Court such
23 as the ex parte motion in this case, the disclosure letter to
24 the defendant's counsel and even the subsequent motion in
25 limine that was filed with the Court?

1 A. There was no specific role. I would review them when
2 AUSAs sent them to me and would offer whatever advice struck
3 me. Primarily, I was helping to circulate go-by examples to
4 assist the AUSAs.

5 Q. Again, during the same period of time we've been talking
6 about, what did you understand the role of the supervisors at
7 the U.S. Attorney's office to be in deciding how to handle
8 complex Giglio matters such as those pertaining to Officer
9 Cook?

10 A. They were to be fully involved in the discussion and we
11 were running all of the materials by them. Then they would
12 be doing whatever review they would typically do for fillings
13 for their supervisees.

14 Q. In your testimony just now and in your Declaration, you
15 make reference to the need to consider Privacy Act concerns
16 or issues related to Officer Cook. Can you tell the Court
17 the basis for that concern or that requirement to have that
18 concern?

19 A. The basic concern came from the U.S. Attorney's manual
20 which directed the AUSAs are required to consider the privacy
21 and reputation interests of the individuals. I also had the
22 experience where I think we were instructed to be keeping
23 this information, using the ex parte and under seal process
24 when necessary when there were privacy interests and it
25 wasn't obvious a disclosure had to be made. We had had a

1 recent incident in the district where the items had not been
2 going to be kept under seal. So we had been trying to be
3 especially careful of that in order not to run afoul of
4 either DOJ policy or the Privacy Act in making these
5 disclosures.

6 Q. Based on the guidance you had in your on-the-job
7 training, do you understand there to be any difference in
8 terms of handling Giglio information for a federal law
9 enforcement officer as compared to a state or local law
10 enforcement officer?

11 A. The main difference is that for the federal law
12 enforcement officers, they have agreements with the
13 Department of Justice that basically obligate them to provide
14 information to assist in Giglio inquiries to the U.S.
15 Attorney's office. There is no such agreement with the state
16 and local law enforcement officers. So when we would request
17 Giglio information, there's actually no obligation for them
18 to respond or give us any information at all. So we were
19 trying to be especially sensitive to respecting the personnel
20 files and trying to protect the privacy interests and whatnot
21 of the officers when dealing with the state law enforcement
22 officers.

23 Q. Did you have any understanding of whether there would be
24 any consequences if you as a Giglio officer or an AUSA in the
25 U.S. Attorney's office failed to give proper regard to the

1 privacy concerns of a law enforcement officer, in this
2 particular case, a state or local law enforcement officer?

3 A. My understanding was there could be potential liability
4 under state or federal Privacy Act considerations or
5 violations of the U.S. Attorney's office policies.

6 Q. And did you have discussions with AUSA Neese regarding
7 that concern?

8 A. I was telling individuals and spoke with AUSA Neese, per
9 the training we received, they needed to treat these
10 documents confidentially. We kept them secured in the U.S.
11 Attorney's office so they were fully accessible to the AUSAs
12 on a case-related need-to-know basis, and I remember passing
13 along the information about the difficulties we had or the
14 issue we had had in following the procedure of having these
15 proceedings be ex parte and under seal previously.

16 Q. With respect to the disclosure made to this Court
17 through the ex parte motion and the hearing with respect to
18 the information, the ex parte hearing, do you recall whether
19 you had any discussions any AUSA Neese about how to proceed
20 with respect to the motion and the hearing?

21 A. To my knowledge, this is the first hearing of this type
22 that we had, but we talked about the desire to have the
23 documents available, not to file them ahead because of the
24 concern that it wouldn't be filed properly. But she was
25 going to have herself and the officer available to testify

1 and the documents also available for review if that would
2 assist the Court.

3 Q. So in your discussion with her, are you saying you did
4 not discuss actually just presenting the documents
5 affirmative to the Court in that ex parte hearing?

6 A. I don't recall specifically discussing that, no.

7 Q. Would you have advised her with regard to whether that
8 should be done or not? What's your position on that?

9 A. I would have certainly advised making them available --
10 having them available and providing it if the Court had
11 requested it, but otherwise, generally, to be cautious
12 because of the need to not be publically disclosing or
13 disclosing more broadly than required some of this
14 potentially protected information.

15 Q. But if it's an ex parte hearing, why would that be a
16 concern?

17 A. In the ex parte hearing available to the Court, there
18 would not be a concern with that. The Court would have been
19 able to review the documents upon request, at least if we had
20 potentially had to go back and verify or confirm and inform
21 the local agency that this would be happening.

22 Q. Did you express to Ms. Neese that a preference for
23 providing the Court with a summary of the information in the
24 ex parte information as opposed to providing the Court with
25 the actual source documents?

1 A. Yes.

2 Q. And what was that? What did you tell her?

3 A. I don't recall the specific conversation other than this
4 was the approach of the district in order to focus on the
5 issues and not have the Court need to slog through various
6 documents. So for efficiency and also to be as deferential
7 as we could appropriately be to the privacy considerations.

8 Q. And it was your understanding at that time that that was
9 the preferred practice in the district?

10 A. Yes.

11 Q. When you reviewed the filings, the draft ex parte motion
12 and the draft of the disclosure letter to the defendant's
13 counsel, what did you understand the purpose for your review
14 of those documents to be?

15 A. The review wasn't required, but my role when I was sent
16 these documents was generally to look them over and ensure
17 they were consistent with the general procedural practices of
18 the office, reflected the ex parte and under seal aspect for
19 purposes of the Court's disclosure, and I was generally
20 looking for sort of typos or any other thoughts that struck
21 me as I was reading through.

22 Q. To what extent did you review the description or the
23 summary of the potential Giglio information that was
24 described in those documents?

25 A. I looked over it. I don't remember having any specific

1 discussion of it at that time. It was several months after
2 we gathered the information, but I read over it and just sort
3 of looked at the overall content and aspects of the filing.

4 Q. So was it your belief that the summary was sufficient,
5 based on the facts as you knew them?

6 A. That was my understanding, yes.

7 Q. And what was the basis for your -- what were the factors
8 you considered in coming to that understanding?

9 A. I had reviewed the information we had received from the
10 various offices back in December. I knew that AUSA Neese had
11 been having extensive conversations with supervisors and the
12 supervisors who had been looped in were not particularly
13 concerned about this information. It remained influential to
14 me when we were disclosing the fact of the discipline, which
15 is part of the information we try to gather and also the fact
16 that the individuals who had engaged in the investigation had
17 considered Investigator Cook to be open and forthcoming with
18 them in that investigation and didn't think there were any
19 credibility issues as to Investigator Cook.

20 Q. You mentioned the supervisors didn't appear to be
21 concerned about that information. Which supervisors are you
22 referring to?

23 A. I remember an e-mail from the First Assistant U.S.
24 Attorney Giorno, who had reviewed information in the files
25 and said it didn't seem to reflect any concern about

1 truthfulness or bias. And from the conversations about AUSA
2 Neese repeatedly looping in supervisors and talking about the
3 generalized information, some folks didn't think there was
4 any need for any disclosure, even *ex parte*, or certainly
5 thought the *ex parte* process was sufficient and appropriate
6 to outline the sexual nature of the conduct and the
7 discipline and whatnot that we needed to disclose.

8 Q. The e-mail you're referring to from the first assistant,
9 was that also copied to other supervisors, including the
10 criminal chief and the deputy criminal chief?

11 A. That sounds right. I don't remember the specific copy,
12 but it was a full loop of supervisors and I was looped into
13 that afterward as well.

14 Q. For clarification, you talked about when you got into
15 the matter, the decision had already been made that an *ex*
16 parte motion needed to be filed rather than a straight out
17 disclosure to defense counsel. Am I recalling your testimony
18 correctly?

19 A. Yes.

20 Q. Do you know who made that decision?

21 A. I received the information from just the initial e-mail
22 from AUSA Jacobsen asking me to send examples for these
23 filings and I knew from talking to AUSA Neese she had
24 previously talked in detail with AUSA Bockhorst and AUSA
25 Cullen and others involved in reaching that determination.

1 Q. Did you have any disagreement with that determination
2 once you got into the case?

3 A. No, it made sense.

4 Q. Did you have -- what was your intent in the way that the
5 conduct was summarized in the ex parte motion and the
6 disclosure to defense counsel? What was the intent when you
7 reviewed that and you felt that that was sufficient?

8 A. The goal was to provide information giving the gravamen
9 of the conduct to the Court and sufficient information in
10 order to enable the Court to make a ruling on potential
11 disclosure and admissibility.

12 Q. Did you have any intent to minimize or hide or fail to
13 disclose any relevant material to the Court or to the defense
14 counsel in this particular case?

15 A. No, not at all.

16 MR. MOUNTCASTLE: That's all I have, Your Honor.

17 MR. BEERS: Nothing further, Your Honor.

18 THE COURT: Thank you. You may step down.

19 MR. BEERS: Defense rests.

20 THE COURT: It's five after one. Would you all like
21 to take a lunch break then?

22 MR. MOUNTCASTLE: We can. I'm just thinking a
23 minute. I don't think I have any other witnesses, so the
24 government is going to rest as well.

25 THE COURT: I take it y'all would like to argue the

1 case.

2 MR. BEERS: Just briefly, Judge. We briefed it.

3 Brief argument on my part.

4 MR. MOUNTCASTLE: I just have a small argument. I'm
5 not going to go into all the details. It's been briefed
6 extensively. I just have a couple points I'd like to make.

7 THE COURT: We'll take about a five-minute recess and
8 then come back.

9 (Recess at 1:10 p.m. until 1:15 p.m.)

10 MR. BEERS: May it please the Court.

11 Your Honor, thank you for affording us so much time.
12 I also thank you for appointing me to represent the
13 defendant, Mr. Burns, in such an interesting case, I think a
14 very important and disturbing case.

15 Judge, both sides are briefed this issue thoroughly.
16 I'll just say one addition. In March of this year, the
17 Supreme Court, in a case called Wearry, W-E-A-R-R-Y, v. Cane,
18 136 Supreme Court 1002, reversed summarily, without even
19 affording argument, reversed a Court of Appeals refusal to
20 award a new trial in a Brady and I think a Giglio case, at
21 least Brady and I think it was a Giglio case. In any event,
22 Judge, the Court in that case, and I'm not saying it's
23 factually similar, but the principles, they went over the
24 principles. Said to prevail on his Brady claim -- and
25 despite some of the testimony, Judge, Brady and Giglio, the

1 Supreme Court said 30 years ago, two sides of the same coin,
2 same standard. To prevail on the Brady claim, Wearry, the
3 defendant need not show the "more likely than not would have
4 been acquitted had the new evidence been admitted." They
5 said given this legal standard, Wearry can prevail even if
6 the undisclosed information may not have affected the jury's
7 verdict. In other words, I think the Supreme Court was
8 reemphasizing this is not Strickland versus -- the Strickland
9 ineffective assistance of counsel standard. It's not a new
10 trial standard. It's a lower standard. Ultimately, the
11 Court needs to look at a number of factors.

12 The Fourth Circuit went over some of those factors in
13 2013. This is the case the Court cited in its ex parte order,
14 Sterling, from 2013. "In fashioning a remedy for a Giglio
15 violation, the district court must consider several factors:
16 The reason for the government's delay; whether the government
17 acted intentionally or in bad faith; degree of prejudice;
18 whether any less severe sanction or remedy will prejudice the
19 defendant and deter future wrongdoing by the government.

20 That clarified a couple points, Judge, in the Fourth
21 Circuit. Before that, the cases were in conflict whether bad
22 faith or intentional violations should be considered in
23 considering remedy and also deterrence. We know from 2013 in
24 that opinion that both deterrence and intentional wrongs
25 should be considered in fashioning a remedy.

1 Judge, the remedy we're asking for, if not dismissal
2 of the indictment, which concededly is rare, is a new trial
3 for this judge.

4 First of all, there's no question there was a Giglio
5 violation here. We can talk all day long about the U.S.
6 Attorney's manual, which they never addressed. I addressed
7 it in the brief. It says on its face the policy they
8 supplied, and it's attached to my brief. It doesn't even
9 apply. They never addressed that. It just doesn't apply.
10 It says that on its face. A, it says it doesn't have the
11 force of law and secondly, says it doesn't apply to our
12 situation. That policy or guidance for what you tell local
13 authorities and federal agencies what they have to produce to
14 the U.S. Attorney's office has nothing to do with what we're
15 talking about in this case which is what do they need to tell
16 the defense counsel. That's not in that policy they're
17 relying upon.

18 The Privacy Act is another red herring. It's obvious
19 it's a red herring because we could talk about privacy
20 concerns all day long for Mr. Cook. I don't know why they're
21 so worried about this cop. I think he's waived any privacy
22 interests he may have had in his private parts a long time
23 ago when he got in the car with that lady and pulled her
24 across that console and asked her to perform sex acts on him
25 and said "are you going to leave me hanging, are you going to

1 leave me hanging?" I think any Privacy Act rights were over.

2 The bottom line is, they got their ex parte hearing,
3 which is an extraordinary hearing. They came in and they did
4 it. That's controlled by Pennsylvania vs. Richey.

5 Pennsylvania vs. Richey makes clear that even though Burns
6 and his lawyer, Mr. Snook, from Charlottesville, appointed
7 counsel at that time, didn't know about it, Burns was, at a
8 minimum, entitled under due process principles of the Fifth
9 and Sixth Amendment, he was entitled to a thorough ex parte
10 review of the information. They misled the Court. They told
11 the Court half the story -- not even half the story. They
12 just told the Court in two sentences, she admitted to being
13 flirtatious and even kissing. That's misleading. Not just
14 misleading. It's just a lie. They came in here and lied to
15 this federal judge. She didn't admit to being flirtatious.
16 I asked her, where does it say she admitted to being
17 flirtatious? It's not in Ms. Neese's notes. It's not in the
18 FBI notes. Then to even kissing. Well, that's misleading.
19 Nothing about him trying to expose himself and committing
20 several state court crimes, nothing about him trying to force
21 himself upon her and bruising her knee. Then going in and
22 telling a judge there was nothing in here that called into
23 question his veracity or credibility and they cite all these
24 cases. But he did.

25 There were a number of things. First of all, we

1 haven't talked about this, but he was deceptive when he got
2 the job and he failed the lie detector test. They didn't
3 turn that over. They didn't tell the Court that. They didn't
4 tell Mr. Snook that. They didn't tell the Court or Mr. Snook
5 he failed to report to Botetourt County officers on the job,
6 I guess, smoking marijuana. Didn't tell him any of that.
7 Then more importantly, they didn't tell the Court that he
8 point blank looked at this grand jury witness when he was
9 trying to get sexual satisfaction from her and said, oh, I'm
10 not married, I'm single, I wouldn't be here if I were
11 married, which is a lie. The jury could have understood that
12 was a lie. That's not hard. The man disavowed his wife in
13 the interest of gratifying himself in that car with a federal
14 grand jury witness. He abused his office. Then on the next
15 occasion, he abused it further more significantly in my mind
16 by lying to her and saying you're now a likely target. I
17 told you two or three days ago you were just a witness.
18 Everything's changed now and now you're going to be arrested.
19 He tried to scare the living daylights out of her. Beyond
20 that, when you get arrested, honey, I'm coming over and I'm
21 going to be the one to strip search you. He's trying to
22 intimidate her and he's doing a lot of sick things. But the
23 point is, none of that was disclosed to this Court. That's a
24 violation of Pennsylvania vs. Ritchey. This Court was not
25 able to conduct an ex parte review of the facts because they

1 didn't want His Honor to know the facts.

2 Beyond that, Judge, the Court said even on that PG
3 sanitized version, misleading version they told the Court,
4 the Court said in no uncertain terms his behavior concerning
5 this witness must be disclosed as soon as possible. Of
6 course all that needs to be read together with the Court's
7 standing order, which, of course, Ms. Neese agreed to. She
8 said she doesn't know anything about Brady or Giglio; she's
9 inexperienced. She's signing these orders every day of the
10 week. Provide the defendant any evidence of an exculpatory
11 nature. Once the Court had that hearing, once the Court
12 entered its order, the Court decided this it was exculpatory.
13 It was impeachment material that needed to be turned over.
14 All balancings was over. There's no more Privacy Act because
15 the Privacy Act doesn't apply because this is a Court of
16 competent jurisdiction and that's all ridiculous. The U.S.
17 Attorney's manual doesn't apply. What applies is this
18 Court's order and the Constitution.

19 Instead of providing the evidence the Court told them
20 in two orders to provide and which they promised -- they
21 promised to Mr. Snook at the beginning of this case when he
22 got appointed that they would provide, because they now know
23 it's exculpatory, so they promised to do it, they sent him
24 this mamby-pamby letter that doesn't say anything. It does
25 have a privilege log attached, but it doesn't say there are

1 documents that she could look up. They just mislead him,
2 just like they misled the Court. Mr. Snook -- poor Mr. Snook
3 believed them. I don't believe them, but he did. We
4 shouldn't blame Mr. Snook. Mr. Snook's under no duty to
5 think that they were misleading him. He's under no duty to
6 think they would have the temerity to come in and mislead a
7 federal judge. They misled Mr. Snook. He accepted that. He
8 thought that's all there was and he's under no duty to look
9 behind their representations. Why would he, Judge? They
10 promised him they would give him any evidence of an
11 exculpatory nature.

12 So, they continued to talk about balancing and
13 Privacy Act, and all that's out the window. This Court's
14 order and the Constitution trumps all that. They didn't give
15 him any of the information. So there's no question we have a
16 Giglio violation. The Court's already decided it has to be
17 turned over. The Court's already decided it's favorable to
18 the accused because it tends to impeached. The Court's
19 already decided it's material and has to be produced. The
20 Court has already decided it's Brady and Giglio material and
21 needs to be shared. They didn't want to share it. That's
22 what they have not wanted to do from the beginning of this
23 case, share it with the defense. Why? Because it's more
24 important to protect this dirty cop. That's why they didn't
25 want to share it. They never wanted to share it. They wanted

1 to protect him.

2 The jury should have been able to hear all that,
3 Judge. The jury should have been able to hear the antics
4 they've gone to, to protect this guy, this charade that he
5 could be a DARE officer at Staunton River High School. He
6 was gone the day our brief was filed and it became public
7 because he was never qualified to be a DARE officer. The jury
8 should have heard that that guy, when he's testifying about a
9 confession that he says Burns made, that Burns disputed, that
10 he owes one to the sheriff. He owes one to the task force.
11 He owes one to the U.S. Attorney's office for keeping quiet.
12 They should be able to hear that. That's not governed by
13 Rule 608(b). That's bias information. He owes them one.
14 That guy should have been fired. He should not have been
15 shuttled over to that high school. So he owed them and the
16 jury didn't know that. So, he's up there testifying like
17 he's this school resource officer and the jury was not
18 allowed to know what he owes these people for protecting him.

19 Ms. Neese never told even the sheriff, I guess, the
20 facts about him pulling out his penis and all that. She
21 doesn't remember. She said it's in my notes. What do the
22 notes said? They don't come out and say it. They say he
23 pulled something out and played with it? She said I included
24 it, it was in my notes. She was protecting her friend, the
25 officer. They were protecting their friend, the officer,

1 from the beginning and the jury should have known all that.

2 Turning to these factors, Judge, I don't think
3 there's any question it's a Giglio violation. I think it's a
4 question of remedy. Judge, if they had come into this court
5 or a long time ago instead of causing all this brief writing
6 and hearings and just said, you know what, we made a mistake,
7 we missed the boat, got bad advice from Ms. Wright or
8 somebody, or I don't know. Did something. But it doesn't
9 matter and this and that. That's not what they've done. What
10 they've done is prolong this by coming in and defending what
11 they've done by citing a U.S. Attorney's manual that doesn't
12 apply on its face, by citing the Privacy Act which can't
13 possibly apply once this Court's entered an order and
14 defending things instead of just admitting that they made a
15 mistake. So they acted intentionally. They acted
16 intentionally at the time, Judge. They acted in bad faith at
17 the time and by submitting a brief like they've submitted,
18 they're continuing -- they're continuing their intentional
19 conduct in coming up here and just giving all this
20 bureaucratic talk about divisions and I have to listen to
21 this person. This is a very simple case. The first Giglio
22 officer involved before she was mysteriously assigned off the
23 case said, "I don't mean to be grumpy. I don't know what
24 we're talking about in that e-mail. If the guy was demoted
25 for that conduct, we need to turn over the documents." For

1 this, Ms. Bockhorst was reassigned. She was off the case.
2 Then they brought in Ms. Wright, their Giglio genius from
3 Harrisonburg, to say, no, no, no, we don't have to do all
4 that.

5 How are we going to deter that from happening again?
6 The Fourth Circuit says that is the relevant factor, in
7 addition to the prejudice. It's highly prejudicial when an
8 officer gets to take the stand and read in a confession. It's
9 highly prejudicial when a U.S. Attorney multiples times in
10 his argument says the guy confessed. What's the problem?
11 The guy confessed. But the guy, Investigator Cook, was never
12 subject to proper cross-examination because they violated
13 their ethical responsibilities and their constitutional
14 responsibilities.

15 How are we going to deter that from happening again?
16 The only way the Court can defer that from happening again is
17 to make them retry him, to give him a fair trial. Otherwise,
18 it will happen again. Otherwise, they will continue to
19 cynically say things, you know, it's in our manual, we can do
20 this and we can do that, dah, dah, dah, we need to worry
21 about these officers that go out and drink on the job and
22 assault women. They'll continue to make these cynical
23 arguments unless the Court causes them to do some work and
24 retry this gentleman.

25 Thank you, Your Honor.

1 MR. MOUNTCASTLE: Your Honor, one of the issues here
2 for the Court is the materiality aspect of it. Mr. Beers was
3 correct that the Wearry case he cited to is very much
4 different factually. In that case, the Supreme Court found
5 the government's evidence was built on the jury crediting a
6 single witness and of course the impeachment material in that
7 case went to that witness.

8 Here, you don't have that. Officer Cook was one of
9 many witnesses, as set forth in our brief. So we think that
10 the testimony, the evidence that would have -- the additional
11 evidence the jury would have heard would have been questions
12 about sexual misconduct and statements made to EC. That's
13 what they would have heard. That would not have touched any
14 of the other evidence that was presented to the Court,
15 including the testimony of Officer Dryden, who also took
16 admissions and confession from the defendant about his
17 involvement in the drug conspiracy. So you have -- even
18 assuming that Mr. Snook would have been allowed under Rule
19 608 -- and that's the rule that applies. Those documents
20 show nothing about bias because it has to do with a witness
21 who was not part of this case. There's nothing about bias in
22 those documents. If those documents had been disclosed, Mr.
23 Snook would have asked questions. Did you attempt to have
24 sex with the witness? Did you tell her you were married when
25 you were not? Did you tell her that she would be arrested and

1 in fact, she wasn't a target and you knew that was a lie? He
2 would have been asked those questions, but there's nothing in
3 that information that has anything to do with bias.

4 I think what the Court needs to determine is whether,
5 given what we've done now, the U.S. Attorney's office has
6 done now, contrary to Mr. Beers' cynical arguments we're
7 trying to cover up things, we have, I think, gone to
8 extraordinary lengths to open up our files in this case to
9 include waiving attorney work product privilege with respect
10 to internal e-mails, to make it clear to the Court and
11 whoever else wants to review this matter what happened in
12 this case.

13 So we would submit to you, Your Honor, that your
14 decision here is, in part, had you known the full scope of
15 the impeachment material and applied Rule 608, would you have
16 allowed cross-examination and if you had allowed
17 cross-examination, given the full scope of the evidence
18 presented at trial, the dozen or so witnesses that talked
19 about this defendant's involvement in the drug conspiracy,
20 the testimony of Officer Dryden about his confession to him
21 about being involved in some scam to steal pills from a drug
22 store using two of his co-conspirators, whether Officer
23 Cook's testimony would have made a difference in the grand
24 scheme of things even if he had been asked about five
25 questions regarding his sexual misconduct with a witness, I

1 think that's what you have in front of you for decision at
2 this point.

3 Of course, the government has laid out everything
4 that we know about this matter, every piece of paper that we
5 have on this matter, every e-mail that's relevant that has
6 any substance to it about this matter, for you to see and for
7 you to make a fully informed decision.

8 The only other thing I want to talk about is the
9 accusation which Mr. Beers has made from day one, from the
10 very first document he filed in this case, in which he
11 accuses AUSA Neese, AUSA Wright, perhaps even AUSA Bradylyons
12 of bad faith. I think if Your Honor looks at the full scope
13 of the evidence, including the e-mails, it's not a picture of
14 bad faith. It might be a picture of things not being done to
15 perfection and maybe even some fumbles, but it's not bad
16 faith.

17 With respect to AUSA Neese, you see repeatedly in the
18 documents that she is continuously herself raising the issue
19 of this Giglio information with Officer Cook. She's
20 initiating discussions with her supervisors. She's seeking
21 guidance from her supervisors and the Giglio officer how to
22 handle this. What's the proper way to handle this? What do
23 I need to do? She's the one that initiates the information
24 that uncovers in the first instance the potential Giglio
25 information pertaining to Officer Cook. She is the one who

1 is discussing this --

2 THE COURT: The witness, whatever her initials are,
3 didn't her lawyer contact justice first?

4 MR. MOUNTCASTLE: Her lawyer contacted justice first,
5 but AUSA Neese found out first about the Botetourt
6 information. It's her questioning that first uncovered the
7 Botetourt information.

8 Yes, with respect to the Bedford County information,
9 it was the lawyer that contacted her and she immediately
10 contacted her supervisors, received instructions from her
11 supervisors to -- I think even the very same day that that
12 contact was made, she was in the attorney's office receiving
13 the attorney proffer. The very next day, there was the
14 interview with the witness herself. So that information, the
15 minute that was provided to her, she acted upon it. The very
16 same day of the interview with the witness, the entire file,
17 everything that they had at that time, and they didn't have
18 Agent Emmerson's form. He didn't complete that until the
19 18th. But on the 16th, they took all that information that
20 was in the possession of the U.S. Attorney's office, Ms.
21 Neese did, to the Bedford County Sheriff's Office. She even
22 provided her attorney work product privilege notes, which
23 contain all of the essential information that ended up in
24 Emmerson's report later anyway.

25 All that, Your Honor, paints a picture not of bad

1 faith, but a good faith attempt. Perhaps, as the Court has
2 questioned it, maybe perhaps insufficient and perhaps
3 deficient in terms of whether it was perfect or not, but it
4 all indicates a good faith attempt to comply with the Giglio
5 requirements. The issue of the Privacy Act, the government
6 is not here saying the Privacy Act trumps the constitutional
7 right. We're not saying that at all. For whatever reason,
8 the DOJ guidance spends a lot of time talking about the
9 Privacy Act in this context. That's just a fact. And the DOJ
10 training talks about the Privacy Act ad nauseam, maybe
11 overkill. I would say overkill on the Privacy Act because
12 what matters here is the defendant's constitutional rights.
13 But the reason that was brought out in this proceeding and
14 has been brought out in the pleadings is to address the bad
15 faith claim. The fact of the matter is that DOJ policy has
16 been telling these AUSAs, AUSA Neese and AUSA Wright, that
17 you have to consider the Privacy Act. There are privacy
18 right implications. AUSAs has been sued because there was an
19 unwarranted invasion of privacy. You need to avoid that.
20 I'm not saying that's the proper way to look at it. I'm
21 saying that's what was in their minds the whole time this
22 whole matter was being dealt with.

23 So, Your Honor, I would ask the Court to take a look
24 at the totality of the presentation, the evidence before it,
25 including the internal e-mails and the discussion, as well as

1 the testimony. I think it would be -- we would ask the Court
2 to find that there was no bad faith in this particular
3 instance. There are questions about whether the information
4 was adequately handled, but if it was inadequately handled,
5 it was not done in bad faith. That's the whole point of the
6 presentation of the e-mails, of the discussion in-house, to
7 show what was in the minds of these AUSAs as they dealt with
8 this fairly complex and relatively novel issue. Giglio in
9 itself is not novel, but Giglio information about a law
10 enforcement officer is not something that these two AUSAs had
11 handled before. So part of the way it was handled --

12 THE COURT: Can the government get off that easily?

13 You've got people going all the way up to the Attorney
14 General. You have people who are inexperienced handling
15 something -- the defendant is not allowed to suffer because
16 the law enforcement people aren't doing their job.

17 MR. MOUNTCASTLE: And I'm not asking you to let the
18 government off easy, Your Honor. We've laid open what we
19 have, all the information we have. I am talking about the
20 AUSAs that were on the line and what they knew.

21 My suggestion to you is that those two AUSAs, based
22 on all the evidence, were not acting in bad faith. They may
23 have acted erroneously. They may have reacted, overreacted
24 to information being provided by the Department of Justice
25 and supervisors about how things should be handled and the

1 extent to which Privacy Act concerns should be considered,
2 but that's not bad faith. That's my point here, Your Honor.

3 In terms of the outcome of the case, I leave -- we
4 leave it to Your Honor, based on all the facts, to decide
5 what should happen in this case. But I'm here to suggest to
6 the Court and to strongly argue to the Court that whatever
7 happened with the handling or mishandling of information was
8 not a product of bad faith or ill intent on the part of the
9 AUSAs who were on the line handling it.

10 That's all I have. I'll be happy to answer any
11 questions you may have.

12 THE COURT: Thank you.

13 Anything else?

14 MR. BEERS: No, Your Honor.

15 THE COURT: I'll try to let you have an answer in a
16 few days.

17 Thank you.

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"I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Sonia Ferris July 20, 2016"